



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 570 OF 2017

NOREEN SHARIFF & OTHERS, AS ADMINISTRATORS OF THE
ESTATE OF JIM CHOGE.....APPLICANTS

VERSUS

CHIEF LAND REGISTRAR.....1ST RESPONDENT

PATRICK BUCHA, SECRETARY, HOUSING STATE

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT.....2ND RESPONDENT

NAKURU LAND REGISTRAR.....3RD RESPONDENT

and

AMUSEMENT GARDEN LIMITED.....INTERESTED PARTY

RULING

Introduction

1. By an amended originating Notice of Motion dated 14th June 2019, the applicant's seek the following orders:-

- a. An order of committal for contempt of court be made against the Chief Land registrar (Nairobi Central Lands Registry), Secretary Housing, State Department of Housing and Urban Development (Ministry of Lands) and Nakuru Land Registrar, the Respondents herein for a term of six months or such other period of time as this honorable court may deem fit and just.
- b. A declaration that the first Respondent alongside the officer in charge, reconstruction of records in Nairobi Central Lands Registry are in contempt of this honorable court and are hereby directed to purge the said contempt by issuing title in respect of LR Nos. 12408 & 12862 (I.R. No. 32126 & 36738) in the name of the administrator of the Estate of the late Jim Choge.
- c. A declaration that the 2nd and 3rd Respondents (Secretary Housing) & the Director, Housing alongside Nakuru County Land Registrar are in contempt of this honorable court orders and are hereby directed to purge the said contempt by issuing validation letters & effecting the sale that was done vide court orders dated 2nd March 2016 & 13th June 2013 respectively in respect of Nakuru properties belonging to the Estate of the late Jim Choge.
- d. A declaration that the 1st, 2nd, and 3rd Respondents are in contempt of this honorable court orders and thus be declared unfit to hold any public office.
- e. An order that costs of and occasioned by this Motion and for obtaining leave of this honorable court be paid by the Respondent and/or any such party as this honorable court may deem fit.

The grounds

2. The application is premised on the grounds enumerated on the face of the application. Essentially, the core grounds are that the Respondents have defied court orders issued on 20th March 2018, 13th June 2013 and on 2nd March 2016. The applicants state that the said orders were served upon the Respondents herein, but, they have refused to comply.

3. The applicants also state that the office of the Official Receiver by letters dated 11th October 2011 and 12th February 2015, discharged the parcels of land, the subject of the court orders, namely, Nakuru Municipality Block 5/144, 149, 150 & 221 respectively and directed the Nakuru Lands Registry to issue fresh titles in respect of the same without encumbrances.

4. Further, they state that the National Land Commission vide letters dated 25th June 2015 and 8th June 2016 addressed to the Ag. Secretary, Housing, Ministry of Lands and Urban Development and Mr. Patrick Bucha, the 2nd Respondent directed them to validate the said properties as per the court orders but the letter was not acted upon.

5. In addition, the applicants state that the Office of the Attorney General vide a letter dated 13th July 2016 addressed to the 2nd and 3rd Respondents and copied to the National Land Commission and the applicants' advocates, directed the first and second Respondents to comply with the said court orders, but they did not comply.

Second and third respondent's Replying Affidavit

6. Patrick M. Bucha, the Secretary, Housing, in the Ministry of Transport, Infrastructure, Housing and Development swore the Replying Affidavit dated 25th May 2018. He averred that the applicant's lack all the necessary documents for the transfer of any property from the government to an individual, namely, a letter of allotment, receipts for payments made to government and an agreement of sale and as such validation of the properties as directed by Justice Musyoka on 2nd March 2016 will amount to an illegality.

7. He further averred that the Ethics and Anti-Corruption Commission have since moved the High Court at Nakuru in Miscellaneous Application No. 102 of 2018, Ethics and Anti-Corruption Commission v Noreen Shariff Choge, Eva Cherogony, Byron Kipngetchi Gawon Choge (Administrators of the Estate of Jim Choge-deceased and obtained preservation orders valid for 6th months till 23rd October 2018. He annexed a copy of the application and averred that in light of the said preservation order, the court ought to stay the enforcement of Justice Odunga's judgment delivered on 20th March 2018 pending the outcome of the investigations by the Ethics and Anti-corruption Commission.

8. He further averred that on 30th July 2008, vide an advertisement in the Standard Newspaper, the ministry of Housing through a Circular Ref. No. CHSF/EST/01/2/Vol. 11/41 dated 24th January 2007 and Ref. No. CHSF/EST/10/2/Vol. 11/51 dated 2nd March 2007, the State Department cancelled the proposed sale of all Government houses in the districts including the applicant's properties situate in Nakuru District.

9. Mr. Bucha further averred that at the time the court order sought to be enforced was issued, (i.e. 1st March 2016), the validation process had already been cancelled and there is no way validation can be done where there is cancellation. He further averred that the validation process and the procedures as approved then were prepared before the 2010 Constitution and the establishment of the National Land Commission and as such there are no procedures for validation and therefore any process purporting to validate any government property would be illegal ab initio.

10. He also averred that the order of 2nd March 2016 compelling the Government to validate its own houses was issued by a succession court under the impression that the said houses belonged to the applicant, and, that, the said succession cause is still pending in court.

11. Mr. Bucha further averred that the listed houses are all alienated Government lands which have Government Residential buildings for housing civil servants, and that, in total the parcels on land in question have 24 government houses, with one house each standing on parcels numbers 144, 147, 149 and 150 and 20 units in parcel number 21 which houses are currently occupied by civil servants who pay rent through a check-off system to the Ministry of Housing. He further averred that on 26th March 2018, the Attorney General filed a Notice of Appeal and requested for typed proceedings to facilitate filing of an appeal and the file went missing.

The fourth Respondent's Replying Affidavit

12. Mr. Caleb Wanjala Sunguti, the District Land Registrar, Nakuru, swore the Replying Affidavit dated 28th March 2018. He averred that the application is pre-mature and that it offends the Contempt of Court Act. [1] He further averred that on 13th April 2018, the Ethics and Anti-Corruption Commission moved to court in High Court at Nakuru in Miscellaneous Application No. 102 of 2018, Ethics and Anti-Corruption Commission v Noreen Shariff Choge, Eva Cherogony, Byron Kipngetchi Gawon Choge (administrators of the Estate of Jim Choge) and obtained preservation orders valid for 6 months till 23rd October 2018, hence, the judgment in this case ought to be stayed.

13. He further averred that the above notwithstanding, he has since issued provisional certificates of title for Nakuru Municipality Block 5/144, 147, 149, 150 & 221, but, pursuant to the orders issued in the above case, a restriction has since been placed on the said titles stopping any further dealings in the said parcels until the same is lifted.

Interested Party's Replying Affidavit

14. Julie N. Mathenge, a Director and a Shareholder of the Interested Party swore the Replying Affidavit dated 19th July 2019. She averred inter alia that the interested party is the registered proprietor of LR Nos. 12408 and LR No. 12862, and, that it holds the titles for the said properties. Further, she averred that on 30th April 2015, she wrote to the first Respondent regarding LR No. Gazette Notice Number 2730

and informed him that title for LR No. 12862 (IR No. 36738) had not been lost and that it was in the possession of the Interested Party. In addition, she deposed that there is no explanation as to why the Interested Party's property was included in the succession proceedings in respect of the deceased estate.

Applicant's further Affidavits

15. Noreen Shariff, the first applicant herein swore two further affidavits, namely, the affidavit filed on 19th June 2018 in reply to the 4th Respondent's and the 2nd and 3rd Respondents' Replying Affidavit. And, the affidavit filed on 23rd July 2019 in reply to the Interested Party's Replying affidavit.

16. In the first affidavit, she averred that the Respondents have raised the same issues which have been raised and determined by the court. She averred that the issue before the court is not the legality of the court order but whether the orders have been obeyed. She further averred that once a court order is issued, the same must be obeyed, and, that, the Respondents instead of filing an appeal opted to lodge a complaint with the Ethics and Anti-corruption Commission culminating in the filing of Miscellaneous Application No 102 of 2018. She deposed that the preservation order issued in the said case is a scheme to circumvent valid court orders. In addition, she deposed that the applicants herein are not parties Miscellaneous Application No 102 of 2018.

17. She also averred that contrary to the averments that the applicants do not have any documents relating to the said properties, they do have the documents and that they submitted them to the Respondents who have refused to issue provisional titles.

18. In the second supplementary affidavit, the first applicant deposed that the issue before this court is not the merits of the case but disobedience of court orders. She averred that the allegations are aimed at derailing the contempt application.

The arguments

19. Mr. Langat, counsel for the applicants relied on the pleadings filed and cited the failure to obey the court orders and urged the court to grant the orders sought. As for the proper procedure for instituting contempt proceedings after the Contempt of Court Act[2] was declared unconstitutional, counsel relied on the Judicature Act[3] and section 3A and 63 of the Civil Procedure Act[4] and Order 53 Rule 2 of the Civil Procedure Rules and the Rules of England. He argued that disobedience of court orders erodes the Rule of Law.

20. Mr. Munene, the Respondents' counsel relied on the Replying Affidavits of Patrick Bucha and Caleb Sunguti. He submitted that there is a pending suit in Nakuru being Misc application number 102 of 2018 in which preservation orders were issued on the lands in question.

21. On the procedure, Mr. Munene argued that Petition No 87 of 2018 nullified the Contempt of Court Act[5] which had repealed section 5 of the Judicature Act.[6] It was his submission that there is no law on contempt until Parliament enacts a new law. He submitted that at the time the initial application was filed, leave was a requirement, and, the applicants never sought leave. It was his submission that, since leave was a requirement at the time the application was filed, the initial application was incompetent.

22. Mr. Gitonga, counsel for the Interested Party relied on the Replying Affidavit of M/S Mathenge. His argument was that the two properties which the applicant's seek to be issued with titles belong to the Interested Party. He argued that the application is based on perjury and lies. He submitted that the orders if granted will affect the Interested Party's right to property.

23. On the applicable law, counsel argued that since the Act was annulled by the court, the applicable law now is section 5 of the Judicature Act.[7] He submitted that the applicant ought to have obtained leave, hence, the application is incompetent.

Determination.

24. It is common ground that as at the time the initial application was filed on 25th April 2018, the applicable law was the Contempt of Court Act.[8] On 9th November 2018, during the pendency of the application, the said act was nullified by the High Court in *Kenya Human Rights Commission v Attorney General & another*. [9] To my mind, the said decision has not been reviewed or overturned on appeal.

25. In view of the divergent position taken by the parties on the applicable procedure for instituting contempt proceedings, I find it useful to examine the procedure under the nullified act because it was the applicable law at the time this application was filed. Section 30 of the nullified act provided that:-

1. Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

2. No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

3. A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

4. If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

5. Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

6. No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

26. Sub-section (1) of the above section required the court to serve a notice of not less than 30 days. Sub-Section (2) provided that no contempt proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation unless the court has issued a notice of not less than 30 days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer. This provision was not complied with.

27. Sub-section (3) provided that "A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General." There is no evidence that Principal Secretary was served as required under this sub-section. Again, this provision was not complied with.

28. It is important to mention the word *shall* appears in the above provisions. According to *Black's Law Dictionary*, the term "*shall*" is defined as follows:-

"As used in statutes, contracts, or the like, this word is generally imperative or mandatory. In common or ordinary parlance, and in its ordinary significance, the term "shall" is a word of command, and one which has always or which must be given a compulsory meaning: denoting obligation. It has a peremptory meaning, and is generally imperative or mandatory. It has the invariable significance of excluding the idea of discretion, and has the significance of operating to impose a duty which may be enforced, particularly if public policy is in favor of this meaning, or when addressed to public officials, or where a public interest is involved, or where the public or persons have rights which ought to be exercised or enforced, unless a contrary intent appears."

29. The definition goes on to say "*but it may be construed as merely permissive or directory (as equivalent to "may"), to carry out the legislative intention and in cases where no right or benefits to any one depends on its being taken in the imperative sense, and where no public or private right is impaired by its interpretation in the other sense.*" So "*shall*" does not always mean "*shall*." "*Shall* sometimes means "*may*."

30. The classification of statutes as mandatory and directory is useful in analyzing and solving the problem of what effect should be given to their directions.^[10] But it must be kept in mind in what sense the terms are used. There is a well-known distinction between a case where the directions of the legislature are imperative and a case where they are directory.^[11] The real question in all such cases is whether a thing has been ordered by the legislature to be done and what is the consequence if it is not done. The general rule is that an absolute enactment must be obeyed or fulfilled substantially. Some rules are vital and go to the root of the matter, they cannot be broken; others are only directory and a breach of them can be overlooked provided there is substantial compliance.

31. The court has a duty to try to get at the real intention of the Legislature by carefully attending to the whole scope of the statute to be considered. The Supreme Court of India has pointed out on many occasions that the question as to whether a statute is mandatory or directory depends upon the intent of the Legislature and not upon the language in which the intent is clothed. The meaning and intention of the Legislature must govern, and these are to be ascertained not only from the phraseology of the provision, but also by considering its nature, its design and the consequences which would follow from construing it in one way or the other.

32. A provision in a statute is mandatory if the omission to follow it renders the proceeding to which it relates illegal and void, while a provision is directory if its observance is not necessary to the validity of the proceeding, and a statute may be mandatory in some respects and directory in others.^[12] One of the important tests that must always be employed in order to determine whether a provision is mandatory or directory in character is to consider whether the non-compliance of a particular provision causes inconvenience or injustice and, if it does, then the court would say that, the provision must be complied with and that it is obligatory in its character.^[13]

33. The word "*shall*" when used in a statutory provision imports a form of command or mandate. It is not permissive, it is mandatory. The word *shall* in its ordinary meaning is a word of command which is normally given a compulsory meaning as it is intended to denote obligation.^[14] The Longman Dictionary of the English Language states that "*shall*" is used to express a command or exhortation or what is legally mandatory.^[15]

34. From the above analysis, the conclusion becomes irresistible that the original application as filed was incurably incompetent for offended the above provisions.

35. However, on 19th June 2019, the applicant's counsel filed an amended originating Notice of Motion dated 14th June 2019, the subject of this ruling, pursuant to this court's leave granted on 10th June 2019. The Motion is expressed under section 5(1) of the Judicature Act,^[16] sections 3A and 63 of the Civil Procedure Act,^[17] Order 52 Rule 2(2) of the Rules of the Supreme Court of England, 1965, The Contempt of Court Act, 1981 and Part 8, Civil Procedure (Amendment No. 2) Rules, 2012, Laws of England.

36. Mr. Munene's argument as I understood it was that since the act was nullified by the court, we have no law on Contempt of Court until and unless Parliament enacts another legislation. All the other advocates in this matter were unanimous that after the act was nullified by the court, we reverted to section 5 of the Judicature Act.^[18]

37. Section 38 of the nullified act repealed section 5 of the Judicature Act.^[19] To this extent Mr. Munene was right. Perhaps I should add that section 39 of the same act repealed section 36 of The High Court (Organization and Administration) Act,^[20] while section 40 repealed section 35 of The Court of Appeal (Organization and Administration) Act.^[21] The question that calls for an answer is whether after the act was nullified by the High Court, the sections it repealed still stand repealed.

38. The next question is whether the applicants' application is competent since the original application was expressed under the nullified act and the amended application invoke sections 3A and 63 of the Civil Procedure Act.[\[22\]](#) I now turn to this question.

39. Our courts derive their power from the Constitution and the statutes that regulate them. Historically, the high court, in addition to the powers it enjoyed in terms of statute, has always had additional powers to regulate its own process in the interests of justice. This was described as an exercise of its inherent jurisdiction. Citing I H Jacob *Current Legal Problems*, Freedman C J M adopted the following definition of 'inherent jurisdiction'[\[23\]](#)

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

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

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

41. The inherent jurisdiction of the high court has long been acknowledged and applied by our courts.[\[24\]](#) However, a court's inherent power to regulate its own process is not unlimited. It does not extend to the assumption of jurisdiction which it does not otherwise have. In this regard in *National Union of Metal Workers of South Africa & others v Fry's Metal (Pty) Ltd*[\[25\]](#) the court stated that:-

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

42. I am aware of a recent High Court ruling rendered in *Republic v Kajiado County & 2 Others ex parte Kilimanjaro Safari Club Limited*[\[26\]](#) in which the court held as follows:-

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

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

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

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

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

43. I agree with the above reasoning that since the act that repealed section 5 of the Judicature Act[\[27\]](#) has been declared unconstitutional, the effect is that section 5 of the Judicature Act[\[28\]](#) still stands. Having concluded as aforesaid, I find it fit to examine the procedure for instituting contempt of court proceedings under section 5 of the Judicature Act[\[29\]](#) which provides as follows:-

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

44. Discussing the procedure for instituting Contempt proceedings in Kenya, the High Court in the *John Mugo Gachuki vs New Nyamakima Co. Ltd*^[30] observed as follows:-

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

45. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the alleged contempt is committed. Section 5 of the Judicature Act^[31] imposes a duty on the High Court, the Court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time the application is brought. This duty was noted by Platt J and Porter J in the matter of an application by *Gurbaresh Singh & Sons Ltd*^[32] as follows:-

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

46. The Court of Appeal In *Christine Wangari Chege vs Elizabeth Wanjiru Evans & Others*^[33] observed as follows:-

"Though the Court of Appeal of England and Wales was established in 1875, some 92 years before the commencement of the Judicature Act,^[34] the Act in the cited Section 5 simply directs that this court like the High Court must make reference to the powers exercised by the High Court of Justice in England and not those exercised by its counterpart, the Court of Appeal of England and Wales.

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

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

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

47. The learned Judges^[35] in the above case correctly pointed out that the rules applicable in the United Kingdom have been applied in Kenya with uneven degree of consistency and cited several examples.^[36] The only consistency in the decided cases is that leave was a requirement.

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

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

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

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

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

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

50. In *Christine Wangari Gacheche*^[37] the Court of Appeal correctly pointed out that leave, now called "*permission*" is not required where committal proceedings relate to a breach of a judgement, order, or undertaking. However, leave is still a requirement for applications under Rules **81.12** & **81.17** cited above.

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

52. The jurisdiction relating contempt of court proceedings, as decided cases suggest is rather problematic.^[38] It appears that Kenyan courts have to continuously and perpetually check upon the current law in force in England and apply it in exercise of this jurisdiction. This is both the substantive and procedural law applicable in England as at the time the contempt is committed.^[39] However, now that the Act was nullified by the High Court, (which decision to my knowledge has not been reviewed or overturned on appeal), it is high time Parliament raises to the occasion, and enacts a comprehensive substantive and procedural law to govern contempt matters.

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

54. It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of courts is upheld at all times. The court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.^[40]

55. 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 civilized societies from those applying the law of the jungle. It is the duty of the court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.^[41] **The court does not, and ought not be seen to make orders in vain; otherwise the court would be exposed to ridicule, and no agency of the constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.**^[42]

56. It is uncontested that a court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. 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 the Constitution. 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.

57. I proceed from the premise that it is a crime unlawfully and intentionally to disobey a court order.^[43] This type of contempt of court is part of a broader offence, which can take many forms, but the essence of which lies in violating the dignity, repute or authority of the court.^[44] The offence has in general terms received a constitutional 'stamp of approval,'^[45] since the Rule of Law – a founding value of the Constitution – 'requires that the dignity and authority of the courts, as well as their capacity to carry out their functions, should always be maintained.'^[46]

58. In the hands of a private party, the application for committal for contempt is a peculiar amalgam,^[47] for it is a civil proceeding that invokes a criminal sanction or its threat. And while the litigant seeking enforcement has a manifest private interest in securing compliance, the court grants enforcement also because of the broader public interest in obedience to its orders, since disregard sullies the authority of the courts and detracts from the rule of law.

59. The test for when disobedience of a civil order constitutes contempt has come to be stated as whether the breach was committed 'deliberately and *mala fide*.'^[48] A deliberate disregard is not enough, since the non-complier may genuinely, albeit mistakenly, believe he/she is entitled to act in the way claimed to constitute the contempt. In such a case good faith avoids the infraction.^[49] Even a refusal to comply that is objectively unreasonable may be *bona fide* (though unreasonableness could evidence lack of good faith).^[50]

60. These requirements – that is the refusal to obey should be both *wilful* and *mala fides*, and that unreasonable non-compliance, provided it is *bona fide*, does not constitute contempt – accord with the broader definition of the crime, of which non-compliance with civil orders is a manifestation. They show that the offence is committed not by mere disregard of a court order, but by the deliberate and intentional violation of the court's dignity, repute or authority that this evinces.^[51] Honest belief that non-compliance is justified or proper is incompatible with that intent. The Constitutional Court of South Africa,^[52] 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.”

61. It is an established principle of law that^[53] in order to succeed in civil contempt proceedings, the applicant has to prove *(i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.* Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.^[54] Perhaps the most comprehensive of the elements of civil contempt was stated by the learned authors of the book *Contempt in Modern New Zealand*^[55] who succinctly stated:-

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

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

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

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

(d) the defendant's conduct was deliberate.

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

63. Two principals emerge. The *first* is liberty:- it is basic to our Constitution that a person should not be deprived of liberty, albeit only to constrain compliance with a court order, if reasonable doubt exists about the essentials. The *second* reason is coherence:- it is practically difficult, and may be impossible, to disentangle the reasons why orders for committal for contempt are sought and why they are granted: in the end, whatever the applicant's motive, the court commits a contempt respondent to jail for Rule of Law reasons; and this high public purpose should be pursued only in the absence of reasonable doubt. Accordingly, it is impermissible to find an alleged contemnor guilty of contempt in the absence of conclusive proof of the essential elements. The requisite elements must be established beyond reasonable doubt. In such a prosecution the alleged contemnor is plainly an 'accused person.

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

“The power to order summary imprisonment of a person in order to coerce that person to comply with a legal obligation is far-reaching. There can be no doubt that indefinite detention for coercive purposes may involve a significant inroad upon personal liberty. Clearly it will constitute a breach of s 12 of the Constitution unless both the coercive purposes are valid and the procedures followed are fair. In this case there seems no doubt that the purpose is a legitimate one. It also seems necessary and proper, however, for the exercise of the power to be accompanied by a high standard of procedural fairness.”^[56]

65. It is clear that contempt of court is not merely a mechanism for the enforcement of court orders. The jurisdiction of the superior courts to commit recalcitrant litigants for contempt of court when they fail or refuse to obey court orders has at its heart the very effectiveness and legitimacy of the judicial system. That, in turn, means that the court called upon to commit such a litigant for his or her contempt is not only dealing with the individual interest of the frustrated successful litigant but also, as importantly, acting as guardian of the public interest.^[57]

66. Applying the principles discussed herein above to the facts of this case, I am not persuaded that the *ex parte* applicant has demonstrated that the Respondents willfully failed, refused and or neglected to obey the court order. From the material presented before me, it is clear that a lot of developments have taken place since the issuance of the order. To be specific the developments relate to the same properties the subject of the court orders.

67. First, it is common ground that the Ethics and Anti-Corruption Commission filed Nakuru High Court Miscellaneous Application No. 102 of 2018, *Ethics and Anti-Corruption Commission v Noreen Shariff Choge, Eva Cherogony, Byron Kipngetich Gawon Choge (Administrators of the Estate of Jim Choge-deceased and obtained preservation orders on the same parcels of land. This court was not up dated on the status of the said case, but, one thing is clear from the scanty material presented before me, that is, the said case is still pending.*

68. Second, also said to be pending is the succession cause in respect of the deceased's estate in which one of the orders was issued. The parties were economical with details in that no one disclosed what is pending, if the order sought to enforced emanated from the said file.

69. Third, much as the applicants' counsel submitted that the applicants are not parties to Nakuru High Court Miscellaneous Application No. 102 of 2018, the pleadings presented in court relating to thee said case show otherwise. The applicants are actually parties in the said case.

70. Fourth, it was stated that pursuant to the preservation orders issued in the said case, restrictions were registered against all the titles, the subject of the court orders. It is not clear how the applicants want to process titles when there subsists a restriction on the titles. Differently put, a restriction, just like a caveat operates to bar any transactions or dealings on the register on the tile to the property. It follows that so long the said restrictions subsist, no transfer can be registered.

71. Fifth, it is illogical to cite the Respondents for contempt and accuse them of disobeying court orders when restrictions have been registered pursuant to a court order. The applicant is inviting the Respondents to commit contempt by disobeying a court order in purporting to obey yet another court order. The proper thing to do would have been for the applicants to move the court in Misc 102 of 2018 and obtain appropriate orders.

72. Sixth, from the material before me, it is also evident that the applicants' title is under challenge. It is stated on oath by Mr. Bucha that on 30th July 2008, vide an advertisement in the Standard Newspaper, the ministry of Housing through a Circular Ref. No. CHSF/EST/01/2/Vol. 11/41 dated 24th January 2007 and Ref. No. CHSF/EST/10/2/Vol. 11/51 dated 2nd March 2007, that the State Department cancelled the proposed sale of all Government houses in the districts including the applicant's properties situate in Nakuru District.

73. Seventh, Mr. Bucha averred that at the time the court order sought to be enforced was issued, (i.e. 1st March 2016), the validation process had already been cancelled and there is no way validation can be done where there is cancellation.

74. Applying the principles of the law discussed above to the facts of this case, it cannot be said by any stretch of imagination that the Respondents willfully defied the court orders. Put differently, the applicants have failed to demonstrate the tests for contempt which are a pre-requisite to granting the orders sought.

75. In view of my above analysis and findings, the conclusion becomes irresistible that the applicant's Notice of Motion dated 14th June 2019 is misconceived, has no merits and it is fit for dismissal. Accordingly, I dismiss the applicant's application dated 14th June 2019 with costs to the Respondents.

Orders accordingly.

Signed, Dated and Delivered at Nairobi this 20th day of November 2019

John M. Mativo

Judge

[1] Act No. 46 of 2016. NOTE: This Act was declared unconstitutional by the High Court in *Kenya Human Rights Commission v Attorney General & another* {2018} e KLR.

[2] Ibid.

[3] Cap 8, Laws of Kenya.

[4] Cap 21, Laws of Kenya.

[5] Act No. 46 of 2016.

[6] Cap 8, Laws of Kenya.

[7] Ibid.

[8] Act No. 46 of 2016.

[9] {2018} eKLR.

[10] *Dr Sanjeev Kumar Tiwari, Interpretation of Mandatory and Directory Provisions in Statutes: A Critical Appraisal in the Light of Judicial Decisions*. International Journal of Law and Legal Jurisprudence Studies: ISSN:2348-8212 (Volume 2 Issue 2).

[11] Ibid.

[12] *Subrata vs Union of India* AIR 1986 Cal 198.

[13] See *DA Koregaonkar vs State of Bombay*, AIR 1958 Bom 167.

[14] See *Dr Arthur Nwankwo and Anor vs Alhaji Umaru Yaradua and Ors* (2010) LPELR 2109 (SC) at page 78, paras C - E, Adekeye, JSC .

[15] This definition was adopted by the Supreme Court of Nigeria in *Onochie vs Odogwu* [2006] 6 NWLR (Pt 975) 65.

[16] Cap 8, Laws of Kenya.

[17] Cap 21, Laws of Kenya.

[18] Cap 8, Laws of Kenya.

[19] Ibid.

[20] Act No. 27 of 2015.

[21] Act No. 28 of 2015.

[22] Cap 21, Laws of Kenya.

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

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

[25] 2005 (5) SA 433 (SCA) para 40 citing *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 (A) at 7 F. 6

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

[27] Cap 8, Laws of Kenya.

[28] Ibid.

[29] Ibid

[30] Civil Case No. 456 of 2011.

[31] Cap 8, Laws of Kenya.

[32] Misc Civil Case No. 50 of 1983

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

[34] Supra

[35] Kihara JA, Maraga JA & Ouko JA

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

[37] Supra note 5

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[54] *Ibid*, at page 4

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

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

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