



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW DIVISION
MISCELLANEOUS APPLICATION NO.350 OF 2014

REPUBLIC.....APPLICANT

AND

THE COUNTY GOVERNMENT OF KAJIADO.....1ST RESPONDENT

THE CABINET SECRETARY FOR INTERIOR &

CORDINATION OF NATIONAL GOVERNMENT.....2ND RESPONDENT

THE NATIONAL POLICE SERVICE.....3RD RESPONDENT

NATIONAL ENVIRONMENTAL

MANAGEMENT AUTHORITY (NEMA).....INTERESTED PARTY

EX-PARTE: ENVIRONMENTAL & COMBUSTION CONSULTANTS LIMITED

RULING

Introduction

1. By a Notice of Motion dated 25th March, 2017, the *ex parte* applicant herein, **Environmental & Combustion Consultants Limited**, has moved this Court seeking the following orders:

a. This application be certified urgent and be heard *ex parte* in the first instance.

b. The Honourable Court be pleased to issue orders compelling Mr. David Nkedianye, the Governor County Government of Kajiado to personally appear in Court and Show Cause why he should not be punished for failing to comply with the Court Orders issued herein on 15th September 2014.

c. Mr. David Nkedianye, the Governor, County Government of Kajiado, be detained in prison for a term not exceeding six months for blatantly disobeying orders issued by this Honourable Court on 15th September 2014.

d. This Honourable Court be pleased to deny the 1st Respondent, audience in this matter until and unless it purges the contempt of court committed herein.

e. The Respondent be ordered to pay for the cost of this Application immediately and upon determination of the Application herein.

Ex Parte Applicants' Case

2. According to the applicant, on the 15th September 2014, this Honourable Court granted stay Orders in favour of the Ex-parte Applicant and as expressed in the Court Order issued herein on the 15th September 2014 which orders were extracted and directly served upon the all the Respondents and in particular the 1st Respondent on 22nd September 2014.

3. According to the applicant, the above orders were issued by the Court following the unlawful destruction of the Ex-parte Applicant's premises by the 1st Respondent coupled with the 1st Respondent's irregular and consistent interference with the operations of the Ex-parte Applicant. It was disclosed that upon service, the 1st Respondent appointed its Advocates in October 2014 and filed its Replying Affidavit herein on 24th June 2015 in which the 1st Respondent opposed the operations of the Applicant and vainly claimed that NEMA being the responsible state agency is wrong in allowing the Applicant to operate.

4. According to the applicant, during the pendency of the proceedings and without any regard to the existing court orders and with sole objective to undermine the Court proceedings, the 1st Respondent deliberately declined to issue the Ex-parte Applicant with county business permits and in December 2015, pretended to be carrying out some hearing on the Ex-parte Applicant's operations with the objective of creating grounds to shut down the Applicant's operations. As a result, the Ex-parte Applicant, through its advocates on record, was forced to write to the 1st Respondent reminding it of the existing Court Orders and that its actions were in breach of the Court Orders.

5. It was averred that on 26th January 2017 at about 9 am in the morning, the Ex-parte Applicant's factory located in an isolated area within the Stone Athi Area of Kajiado County and the subject of these proceedings was once again invaded by a number of hired goons who were ferried to the premises from unknown places. Upon seeking assistance from the nearest police station being, Isinya Police Station, the police from Isinya arrived in good time led by the area OCPD a **Mr. Weda** who provided security to the premises and effectively repulsed the goons and denied them forceful entry into the premises. It was disclosed that the said goons were led by the area Member of County Assembly, **Mr. Nkirimpai** who openly indicated that they were carrying out the orders given by His Excellency the Governor and would not leave the premises until the plant is either shut down or destroyed. At around 4pm, the Governor of Kajiado County, **Mr. David Nkedianye**, arrived at the premises in his official Motor Vehicle amid cheers from the goons who were still waiting outside the premises as the police had declined them forceful entry.

6. It was deposed that the Governor, talked to the police and was allowed into the premises in the company of his armed body guard and the area MCA, **Mr. Nkirimpai** and was escorted to the office of the applicants and on arrival he directed that the factory be shut down and that the applicants ceases any form of operations in the premises. According to him, that was the wish of his people and it was his duty to ensure that the factory is shut down forthwith and that is why he was present in person this time round.

7. Upon being informed that he could not shut down the factory because the factory's operations were lawful and duly licensed by the relevant state agencies including NEMA and in any event, the factory was located in an isolated area with no human habitation, the Governor insisted that it had to be shut down immediately failing which he was going to increase the number of goons outside the factory premises and ensure that they destroy the factory. The applicant however informed the Governor that it would proceed and close the factory if he could put his order in writing and reminded him that the matter was pending in Court and the Court had issued valid orders restraining such actions like the one he was engaging in, which order was duly served upon the County Government but he was additionally a copy thereof issued

on 15th September 2014, which was normally kept in the applicant's offices at the factory premises.

8. It was averred that the Governor derided the court order by insisting that what he was concerned about is whether or not the applicant was going to shut down the factory and not some court order. He then asked for a plane paper to put down his directive and ensure that the factory is closed forthwith and upon being given a plane paper he wrote down his directive requiring the shutdown of the factory on the alleged ground that there were some chemical smell coming from the incinerator. The Governor then insisted that the factory be shut down before he could leave the premises and after lengthy deliberations, his directive was complied with.

9. According to the applicant, the Governor being fully aware of the existing Court Orders and the subject court proceedings unfairly disparaged the Court Orders and court proceedings by openly stating that he had no regard to the Court Orders as the Court cannot determine how he runs his County and that the Ex-parte Applicant must shut down its premises regardless of the Court Order and/or the subsisting Court proceedings.

10. It was averred that upon shutting down the factory, the Governor left the premises and stopped outside the gate to address his hired goons who he thanked for the good job and asked them to leave the premises as the factory was now shut down. The goons then left with him though in different vehicles as they had been ferried to the factory premises by use of hired public service vehicles.

11. It was deposed that on 27th January 2017, the Governor **Mr. David Nkedianye**, invited the Ex-parte Applicant's officers for a meeting in a restaurant at Kajiado called Bush Camp, a meeting which was also attended by NEMA officer Kajiado and other cronies of the Governor including **Mr. David Kombe** and **Ms. Carolyne Ndeti**. In the said meeting, the Governor expressly told the Ex-parte Applicant that it must shut down its operations and relocate from Kajiado County and then instructed the applicant to come up with an exit strategy before the hearing of court case which he rightly indicated was due on 7th February 2017.

12. The applicant further contended that on 30th January 2017, the Governor once again summoned its officers for a meeting at Enkasiti Resort in Kajiado, which meeting was attended by senior officials of the 1st Respondent including the Governor, the Deputy Governor, County Legal Officer and the County Executive Officer for Environment and that the Governor's message was clear that the Ex-parte Applicant must not operate anywhere within Kajiado County and all he was interested in was the exit strategy and nothing else. The applicant then informed the Governor that it would require about 10 years to relocate and, based on intense pressure from the Governor suggested that if the 10 years were not acceptable then the Governor or the County Government should buy them out. This was after the Governor threatened to have the premises destroyed if the applicant did not provide an exit strategy.

13. According to the applicant, the Governor was openly displeased with the applicants proposal and lamented that the applicant had squandered the opportunity to make amends and that he was now going to ensure that the applicant did not operate at all.

14. It was disclosed that on 13th March 2017, NEMA wrote to the Governor informing him that the operations were regular and that NEMA was actively monitoring the same and that should the Governor have any complaint then he should direct the same to NEMA for appropriate consideration and action. On 14th March 2017, one **David Kombe**, the Governor's brother in law, visited the precincts of the applicant's facility and was seen studying the same in a suspicious manner, a matter which was reported this matter to the Police and was recorded in the OB.

15. On 16th March 2017, the Governor through his agents and hired goons once again invaded the premises, broke down part of the perimeter wall to gain entry into the premises and then set down the same on fire using some very highly inflammable substance and destroyed all the machines, vehicles and completely paralyzed the operations of the Ex-parte Applicant. On the material day the applicant almost lost 100 of its workers who were inside the premises.

16. According to the applicant although on that day it had requested for security from the area police, it was advised that it could not be given police protection and its attempts to have the police come to its aid during the fire were not fruitful as the police did not show up.

17. It was the applicant's case that the 1st Respondent continued to take advantage of the fact that the applicant's premises are located in an excluded area, close to 100 kilometres from Kajiado town and with no close human inhabitation and as such mounting an attack in the absence of police security is almost a guaranteed success for them. To the applicant, the above actions by the 1st Respondent clearly demonstrate that despite having been duly served with the order herein, the 1st Respondent elected to disobey the Court Order and declined to allow the Ex-parte Applicant to lawfully operate. This action, it was averred was wilful and deliberately calculated and specifically designed to defeat the course of justice and to render the proceedings herein *otios*.

18. It was therefore the applicant's case that the Governor of the 1st Respondent despite having irregularly and unlawfully set down the Company's premises on fire on 21st August 2014 and threatened to frustrate the Company's operations until the same are relocated to another County are keen to realize the same even in contravention of the subsiding Court Orders. It as averred that following the commencement of these proceedings and in blatant furtherance of the above irregular acts and threats, the 1st Respondent unfairly and irregularly instructed its officers not to issue the Ex-parte Applicant with Annual Business Permit despite the Ex-parte Applicant having regularly applied for the said permit and having met all the requisite legal requirements for the issuance of the same.

19. To the Applicant, the above actions of the Governor of the 1st Respondent are illegal and contrary to the rule of law and fair administrative actions.

20. It was averred that the factory's operations are specialized and regulated by NEMA whose officials visit the premises regularly to ensure that the activities do not pose any environmental danger in the area. As opposed to the 1st Respondent, NEMA has sufficient expertise and institutional ability to determine when a project is a threat to the environment. The applicant disclosed that it had carried out its activities within Kajiado area for a period over 20 years and there was never any complaint of environmental degradation or documented health hazard occasioned to any of the neighbors even within its former premises which subsequent uncontrolled developments in the area came to be located at the center of Kitengela Town.

21. The applicant argued that arising from the blatant and uncivilized conduct of the 1st Respondent, it was only fair that they are denied audience until they purge their contempt herein as the contemptuous acts of the 1st Respondent were deliberate and consistent and ought to be addressed by this Court. Further, the actions herein of **Mr. David Nkedianye**, the Governor County Government of Kajiado are an upfront attack on the integrity of our judicial process and the rule of law which actions must not be countenanced.

22. The applicant complained that its Advocate had written to the County Government of Kajiado requesting them to have regard to the court process by complying with the court orders herein but the same bore no fruits.

23. In the applicant's view, the Governor, Kajiado County Government believed that by virtue of his constitutional office, he could blatantly flout court orders and carry out his affairs without any due regard to the rule of law.

Respondents' Case

24. The application was opposed by the Respondent.

25. According to the Respondents, the operations of the incineration facility by the ex parte applicant as Stoni Athi Area at which hazardous and harmful industrial wastes were burnt was faced with complaints

and stiff objections from the residents of the surrounding area who were aggrieved by the irregular and illegal manner in which the applicant's license was granted in disregard of environmental and health concern.

26. The Respondents however denied that there were hired goons on the ex parte applicant's premises and instead the people who were at the applicant's premises were in fact the affected residents of the Stoni Athi area who had assembled to protest the continued emission of unbearably foul smelling fumes from the incinerator in blatant disregard of their wellbeing, habitation and environment.

27. It was however denied that the said residents assembled at the said premises at the invitation of the Governor as he did not have prior knowledge of their said gathering. He therefore denied that he hired the so called goons and that he threatened to increase them and burn down the premises. According to the Respondents, despite the fact that the residents were agitated by the fumes emitted from the facility, they were peaceably assembled without attempt at forcible entry into the premises.

28. As regards the letter written by the Governor it was contended that it was just a request made by the Governor on good faith, with a limited time scope and was justified by the prevailing circumstances in order to avert potential confrontation and accordingly, it cannot be regarded as a breach of the order as alleged. The Respondents contended that in any case the court orders were restricted to lawful operations of the ex parte applicant and did not extend to illegal and unlawful activities in the facility within the jurisdiction of the 1st Respondent.

29. It was averred that the Governor having been called to the premises by the community leaders and the police, his initiative to intervene and resolve the ongoing stand-off between the ex parte applicant and the agitated residents of the area was beneficial hence his acts cannot be regarded as contempt of court orders.

30. According to the Respondents, the applicant's facility was not lawfully established and was not operating in accordance with the law. It was further contended that the continued operation of the incinerator without compliance with environmental standards and in disregard of the health concerns raised by the residents is inimical to the public interest and the safety of the residents. Their view was that the lawful exercise of their mandate conferred by law upon the 1st Respondent to regulate and grant approvals for development and business activities within its area of jurisdiction cannot be challenged in these proceedings.

Viva voce evidence

31. The applicant applied to have the said Governor cross-examined an application which was granted.

32. When the said Governor appeared in Court, he said that on 26th January, 2017, he was on his daily duties attending to *wananchi* when he received a call that there were so many irate people gathered outside the applicant's premises and it was feared that they could break in and destroy the applicant's property. He then called the Deputy Commissioner, Isinya who informed him that he was unaware of the fact.

33. When the Governor arrived between 3 to 4 p.m., he found many people who were annoyed complaining that the premises were emitting foul smell and wanted the place shut down. According to the Governor upon his arrival he calmed down the mob in the company of police officers after which he entered the premises and found the proprietor thereof and updated him on what was going on. He then advised the said proprietor that it was important to cease operations since there was some smoke in order to pacify the mob. It was his case that after 2 hours the proprietor agreed to do so but after demanding that he put the same in writing which the Governor did. According to the Governor the purpose of writing the letter was to pacify the mob and to avoid the destruction of the property. He however denied that he was shown a copy of the Court order and that he disregarded the same.

34. According to the Governor, on 27th January, 2017, cordial discussions were held between NEMA, the proprietor of the facility and himself at Bush Camp followed by two other meetings in order to attempt to bring the people together and amicably settle the matter. He however denied that he summoned the said proprietor to the said meeting.

35. The Governor however denied that he mobilised the mob to burn down the premises but learnt of the incident from the media.

36. The Governor insisted that he is the one who called the Deputy County Commissioner, Isinya, a **Mr Kipkemoi**, who went there accompanied by police officers.

37. When cross-examined by **Mr Agwara** learned counsel for the applicant, he admitted that he was aware that there existed ongoing legal proceedings in respect of the facility which is not a small facility. According to the Governor there are homes around the facility though he could not state the distance. In his view, it was by sheer coincidence that the burning occurred after he had come into the office.

38. He however confirmed that he asked the applicant to close the building down in order to allow for negotiation. He denied that he ferried the people and insisted that he was simply averting a crisis. According to him, his reason for conducting the meeting in a hotel was because they wanted a quiet place in the presence of NEMA. He denied that he wanted the applicant to exit and that he interfered with the operations of the applicant as he had no personal interest in the premises.

39. According to the Governor the Court order must be in the County Government's file as he ordinarily did not deal with the same as the same are dealt with by the County Attorneys.

40. In re-examination the Governor noted that he was sued in his personal capacity and that the order was never brought to his attention.

Applicant's Submissions

41. On behalf of the applicant, it was submitted while reproducing the contents of the supporting affidavit and the replying affidavit as well as the viva voce evidence that disagreeing with or doubting the authenticity of a court order does not constitute a satisfactory reason for not obeying the same. In this respect the applicant relied on **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another [2013] eKLR**, **Joseph Kaburu Kiragu vs. Duncan Ndung'u Ndirangu [2016] KLR**, **Salome Nyambura Kang'ethe T/A Shalom Enterprises & 13 Others vs. Nairobi City County & 8 Others [2016] eKLR**, **Kenya Tea Growers Association vs. Francis Atwoli and 5 Others [2012] eKLR** and **Equity Bank Limited vs. Bryan Yongo & Another [2014] KLR** and relying on section 28 of the ***Contempt of Court Act***, the Court was urged to commit the Governor, **Mr David Nkediye**, to imprisonment for a term not exceeding 6 months so as to maintain the integrity.

Determination

42. I have considered the application, the affidavit both in support of and in opposition to the application.

43. It must be remembered that 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”.

44. 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”.

45. 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.

46. 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 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...”

47. 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.”

48. It was therefore appreciated by Ojwang, J (as he then was) in B vs. Attorney General [2004] 1

KLR 431 that:

“The Court does not, and ought not to 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.”

49. In this case, there was clearly an order issued by this Court. That order restrained the Respondents from destroying, or interfering with the applicant’s property, lawful operations, developments and investments and or any other action whatsoever which would be detrimental to the Applicant’s properties, lawful investment developments and operations in Kajiado County, pending the hearing and determination of the substantive motion or until further orders of the Court.

50. The Respondents have however vaguely alluded to the fact of the lawfulness of the operations of the Applicant. With due respect to the Respondent, if they believed that the applicant was not operating within the confines of the order, they were at liberty to move the Court to set aside the orders. It was not upon them to decide whether or not the applicant’s operations were within the ambit of the Court since to do so would amount to them determining the circumstances under which the order was to be complied with. That is solely the duty of the Court and does not at any given time pass over to the parties to litigation.

51. That was the position in **Petition No. 518 of 2013 Judicial Service Commission vs. Speaker of the National Assembly & Attorney General [2013] eKLR**, where this court held:

“Respect of Court Orders however disagreeable one may find them is a cardinal tenet of the Rule of Law and where a person feels that a particular order is irregular the option is not to disobey it with impunity but to apply to have the same set aside. When the decision to obey particular court orders are left to the whims of the parties public disorder and chaos are likely to reign supreme yet under the preamble to our constitution we do recognize the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law.”

52. In **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004, Musinga, J** (as he then was) recognized 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; that contemnors 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.

53. It was further contended that there is no evidence that the Respondent was served with the order and the penal notice. It is my view that 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.”

54. 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.”

55. This position was adopted by **Musinga, J** in **Republic vs. Minister of Medical Services** (supra) 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.”

56. 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.”

57. 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.”

58. In this case, the Governor conceded that there was an order which was in the records of the County Government. His only contention was that it was not brought to his knowledge and attention by the County Attorney as at the time of the incident the subject of this ruling. He was however aware of the existence of these proceedings. He however directed the ex parte applicant to cease operations. Before he did that he did not say that he sought from the County an update of the legal position.

59. As was held in **Equity Bank Limited vs. Bryan Yongo & Another [2014] eKLR**:

“Where the appropriate officer of the company has been served with the order or has knowledge of the order, a corporation will be liable for contempt. In such a case both the company and the Director of the company who was served or had knowledge of the order would be liable.”

60. The role of the Governor in the affairs of the County Government was clarified in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014** where it was held that:

“...the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources.”

61. The Governor would like the Court to believe that the agreement to close the applicant's factory was mutually arrived at. One then wonders why the applicant insisted that he puts down the directive in black and white. The tenor of the letter itself is clear that the Governor was directing the applicant to shut down the incinerator. It was neither a request nor an agreement. Since the Governor was aware of the existing court proceedings one would have expected him to appraise himself of the position of the same before issuing such a directive. The failure to do so can only mean that either he was aware of the same or he simply did not care whether there existed such an order or not.

62. In my view the then Governor of Kajiado County, **Mr David Nkedianye**, conducted himself in a most despicable manner not expected in this era. He failed to appreciate that with the current Constitution, Kenyans moved away from acts of hooliganism and impunity to values and principles of the rule of law, human dignity, integrity, transparency and accountability. This Court will, where persons take upon themselves to brazenly disregard its orders, take appropriate steps to ensure that its dignity is maintained. This is a case where as appreciated by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** (supra) the Respondent's conduct is *“no more than a subterfuge – a seemingly clever explanation or trick intended to justify the contemptuous acts complained of.”*

63. I am therefore satisfied that the said Governor without any reasonable excuse failed disregarded and disobeyed the orders of this Court and I hold that he was in contempt of Court.

64. The values and principles of governance which are expressly laid out in our Constitution in Article 10 thereof must never be given casual observance or breached with impunity by the Government whether at national or at county level or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010**:

“The new Constitution has enshrined the Bill of Rights of all citizens and to say one group can not enjoy the right enshrined under bill of rights is to perpetuate a fundamental breach of the constitution and to legalise impunity at very young age of our constitution. That kind of behaviour, act or omission is likely to have far and serious ramification on the citizens of this country and the rulers.”

65. I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. The law as articulated by **Montesque**, “should be like death which spares no one”. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, 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.

66. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of

governance with the attendant consequences among other appropriate sanctions.

67. 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 **Mr. David Nkedianye** to personally appear before this Court for the purposes of mitigation and sentencing.

68. It is so ordered.

G V ODUNGA

JUDGE

Delivered at Nairobi this 9th day of April, 2018

P NYAMWEYA

JUDGE

In the presence of: