



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**JUDICIAL REVIEW MISC. APPLICATION NO. 575 OF 2016**

**IN THE MATTER OF: AN APPLICATION BY THE COUNTY SECRETARY, NAIROBI CITY COUNTY FOR ORDERS OF PROHIBITION AND CERTIORARI**

**AND**

**IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT**

**IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENTS ACT**

**AND**

**IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 40, 47, 174,175, 176, 178, AND 236 OF THE CONSTITUTION, 2010**

**AND**

**IN THE MATTER OF AND/OR BREACH OF SECTIONS OF THE INTERGOVERNMENTAL RELATIONS ACT**

**IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORMS ACT, CHAPTER 26, LAWS OF KENYA**

**AND**

**IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010**

**BETWEEN**

**REPUBLIC……..……..……APPLICANT**

**AND**

**THE SPEAKER, NAIROBI CITY**

**COUNTY ASSEMBLY……..…..……..1ST RESPONDENT**

**COUNTY ASSEMBLY**

**OF NAIROBI CITY COUNT…….....…….……..2ND RESPONDENT**

**DR. ROBERT AYISI, COUNTY SECRETARY,**

**NAIROBI CITY COUNTY……...……. EX PARTE APPLICANT**

**RULING**

**Introduction**

1. By a Chamber Summons dated 17th November, 2016, the *ex parte* applicants herein applied for leave to apply for an order of certiorari to quash Gazette Notice No. 6614, Vol. CXII dated 8th September, 2016 issued by the Respondent by which it was stated that from the basement parking to the 5th Floor of the Northern Wing City Hall Building and any other office space therein to form part of the County Assembly of Nairobi. The applicant also sought leave to apply for an order of prohibition prohibiting the Respondents, staff and members of the County Assembly of Nairobi from blocking or interfering with the County Executive Committee's staff access and use of that part of City Hall Main Building particularly the Northern Wing from the basement parking to the 5th Floor, ordinary used as office space by the Rating and Audit Departments of the Nairobi City County Government.

2. The applicant also sought directions that the grant of leave do operate as a stay stopping the Respondent and any of their members, staff or associates from interfering with the Nairobi County Executive Staff from accessing and performing their duties within that part of City Hall Main Building known as the Northern Wing and occupied by the Rating and Audit departments.

3. On 18th November, 2016, this Court granted leave and directed that leave would operate as a stay in the foregoing terms.

4. However by applications dated 25th November, 2016 and 12th January, 2017, the applicant herein substantially sought the following orders:

> **1. THAT the Clerk of the County Assembly of Nairobi, Mr. Jacob Ngwele be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on the 18th November 2016.**
>
> **2. THAT the Speaker of the County Assembly of Nairobi, Hon. Alex Ole Magelo be committed to civil jail for a term of six months for contempt of court for having deliberately disobeyed orders of this court issued on the 18th November 2016.**
>
> **3. THAT an Order do issue restraining the Respondents, from censuring, penalizing, admonishing or in any way discussing the conduct of the Ex Parte Applicant on account of matters that are the subject matter of these proceedings.**
>
> **4. THAT the Honourable Court do declare that the purported censure of the Ex Parte Applicant by the 2nd Respondent on account of these proceedings is sub judice and therefore null and void.**
>
> **5. THAT an Order do issue directing the Clerk of the County Assembly of Nairobi to remove the barriers erected at the entrance to the fourth floor of City Hall Northern Wing ordinarily used by staff from the Rating Department.**
>
> **6. THAT the Honourable Court do Order that the Officer in Charge of Kenyatta International Conference Centre Police Station do enforce the Order of the Honourable Court issued on the 18th November 2016 by the Honourable Justice G.V. Odunga stopping**

**the Respondents and any of their members, staff or associates from interfering with the Nairobi City County Executive staff from accessing and performing their duties within the part of City Hall Main Building known as the Northern Wing occupied by the Rating and Audit Departments pending hearing and determination of the motion or further Orders of the Court;**

**7. THAT the Honourable Court do Order that the Officer in Charge of Kenyatta International Conference Centre Police Station do ensure that staff of the Nairobi City County Executive are not denied access to the 4th Floor of City Hall, Main Building, Northern Wing by the Respondents.**

5. According to the applicant, following the grant of orders stated hereinabove, the Respondents were served with the said court order and they acknowledged receipt on the face of the order. However, despite the said service, the Clerk and Speaker of the County Assembly of Nairobi proceeded to erect a wall at the entrance of the 4th Floor of the North Wing barring staff from the Rating Department from accessing their offices, which act in the applicant's view, showed and demonstrated utter disdain for court orders and judicial processes.

6. It was further averred that the 2nd Respondent with the facilitation of the Clerk of the County Assembly of Nairobi, **Mr. Jacob Ngwele** and **Hon. Alex Ole Magelo** proceeded to censure the Ex Parte Applicant for instituting these proceedings before the Court as directed of him by the County Executive Committee.

7. It was contended that matters that are pending before the courts are *sub judice* and no authority should comment or engage in acts that are meant to undermine the due process of the law or the justice process. Accordingly, the act of the Respondents discussing matters that are pending before this Court was an act of utmost contempt and disrespect to the Court and the same should not go unpunished.

8. The applicant asserted that it is a direct affront to the judicial processes and the authority of the Honourable Court for a party to be harassed, censured, and penalized or in any way intimidated for participating in judicial proceedings yet the Respondents had recklessly and with utmost disregard of the Constitution and the Court engaged in acts that were a complete challenge to the authority of this Court and its processes.

9. The Court was therefore urged to jealously guard its dignity and authority by being firm on anybody who disobeys court orders or interferes with the ability of parties to freely participate in the court's proceedings. It was therefore deposed that to preserve the dignity of court and the inviolability of our judicial process, it is imperative that the Clerk of the County Assembly of Nairobi City County be summoned by court to show cause why he should not be committed to jail for contempt since this Court's orders, while in force, must be obeyed and respected by all.

10. According to the applicant, the Respondents in their pleadings filed before the Court denied ever having stopped Nairobi City County Executive staff and members of the public from accessing the 4th Floor of City Hall, Main Building, Northern Wing and that the Nairobi City County Executive called a contractor to bring down the offending wall erected by the Respondents denying its staff and members of the public access to the 4th Floor, City Hall, Main Building Northern Wing However in total disregard to the Court Order and in a clear departure from their pleadings in Court, the Clerk of the County Assembly on the 11th January 2017 appeared at the 4th Floor City Hall Main Building, Northern Wing in the company of police officers and other persons and ordered staff of the County Executive and the contractors who were called to assist bring down the offending wall out of the offices.

11. The applicant was therefore of the view that to preserve the dignity of court and the inviolability of our judicial process, it is necessary that the Orders sought in this Application are granted and the Orders issued on the 18th November 2016 enforced under the direct supervision of the OCS- Kenyatta International Conference Centre Police Station.

**Respondents' Case**

12. In response to the application, the Respondents averred that from the outset the Nairobi City County Assembly has always had legal right to exclusively occupy, and has been in actual occupation, of the Northern Wing of the City Hall Building ("the suit premises") since the introduction of the devolved system of government in 2013 and therefore did not suddenly emerge from the blues to claim the right of occupation of the suit premises as suggested by the Applicant.

13. The Respondent however admitted that they were aware that this Court had granted the Applicant leave to apply for the judicial review orders of certiorari and prohibition, and directed that the grant of leave shall operate as a stay to stop the Respondents and any of their members, staff or associates from interfering with the Nairobi City County Executive staff from accessing and performing their duties within the Northern Wing of the City Hall Building pending the hearing and determination of the judicial review proceedings herein. They however averred that they had not, and have never, barricaded the suit premises as alleged in the Contempt Application. On the contrary the Valuation and Rating Departments vacated the suit premises in early October 2016 and have been conducting their affairs on different premises ever since. The Respondents however averred the Applicant's claim that the property records and the revenues of the County Government as threatened by the current controversy is false and merely calculated to harass and embarrass them. According to them, the Internal Audit Department continues to enjoy the unhindered access and user of the 5th floor of the suit premises, even though they had promised to vacate the same so that the County Assembly could assume exclusive occupancy hence the allegation that they had barricaded or otherwise interfered with the operations of the Audit Department was false.

14. It was disclosed that since the relevant parts of the vacated suit premises were under renovation, the allegation that the County Staff had been hindered from performing their duties within the suit premises was false. It was averred that the Executive had since pulled down the concrete wall allegedly erected by the Respondents and in its place erected a steel door. The Respondents contended that there were no meaningful operations being conducted on the 4th Floor other than renovations as the operations of the Valuation and Rating Departments continue normally without any interruptions on the 5th Floor where they moved in October, 2016. It was therefore the Respondent's case that the orders sought by the applicant were intended to assist the Executive to forcefully gain access and take possession of the precincts of the County Assembly through the backdoor.

15. While referring to sections 7 and 13 of the ***National Assembly (Power and Privileges) Act***, the Respondents contended that the effect of the orders sought herein would be to compel the Speaker to allow strangers into the precincts of the County Assembly contrary to the said provision and thereby undermine the security, sanctity and independence of the precincts of the county assembly which enjoys special legal protection.

**Deputy Registrar's Report**

16. Since the parties were unable to agree on the factual position of the suit premises, this Court on 15th December, 2016 directed the Deputy Registrar of this Court to visit the suit premises and compile a status report in respect to these proceedings.

17. The Deputy Registrar duly visited the suit premises and by her report filed herein found inter alia that whereas the Executive Committee staffs occupied the 4th and 5th Floors of both the Northern and Southern wing, they had since left the 4th Floor where some renovations were ongoing though there were sacks stuffed with documents while others were on the floor. On the same Floor was a strong room with files which was locked and the key thereto kept by an officer of the County Executive Committee. There was also a safe on the same floor with allegedly important documents.

18. The Deputy Registrar found that on the same 4th Floor on the extreme end on the Southern Wing was a newly built wall barring members of the public access thereto from Entry A. However on the 5th Floor, the County Executive Audi Department, normal operations were going on. The Deputy Registrar's visit to

the City Hall Annex on the 5th Floor also found notices showing where the operations of the land survey's GIS Department and Valuation Department were and the activities thereon seemed normal as members of the public were being served from one room. However, the Chief Valuer in charge indicated that they had some documents left on the 4th Floor main building to which they had aces till 21st November, 2016 when it was blocked.

19. The Registrar reported that the County Assembly contested the allegations made by the Executive and stated that no access had been denied as long as authority from the Sergeant at Arms was sought.

**Determinations**

20. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

21. The law on contempt in this country is now well settled. Court orders are not made in vain and are meant to be complied with and 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".**

22. This position was confirmed by the Court of Appeal in **Refrigerator & Kitchen Utensils Ltd. vs. GulabchandPopatlal Shah & Others Civil Application No. Nai. 39 of 1990**.

23. 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…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".**

24. 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. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

25. Similarly, in **Awadh vs. Marumbu (No 2) No. 53 of 2004 [2004] KLR 458,** it was held that:

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

26. 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."**

27. 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."**

28. 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. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under 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. **Musinga, J** in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 "A" of 2004** was of the view, which view I respectfully associate with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

29. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. Therefore whereas the Court is entitled to take into account the fact that a proved contempt has been purged in deciding what punishment if any to mete, purging a committed contempt does not relieve a party from the consequences of a contemptuous act. This is so because in contempt of court proceedings as opposed to execution proceedings, the dispute is nolonger just between the parties before the Court, but the matter moves to higher pedestal as the dignity of the Court is now brought into question by acts of impunity committed by the contemnor.

30. Therefore the mere fact, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court's hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases.

31. It is therefore my view and I so hold that the Courts are not only empowered to commit for contempt but are under a Constitutional obligation to uphold the rule of law and in doing so to commit for contempt if the conduct of parties invite such course.

32. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order

he is liable to the process of execution. See **Republic vs. Commissioner of Lands & 12 Others *Ex Parte* James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

33. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the 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."**

34. 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."**

35. 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."**

36. 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."**

37. 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."**

38. Therefore the law now is that once a party knows about the existence of a Court order, he can not be heard to claim that he was not served therewith since knowledge supersedes service. It is however upon the applicant to adduce evidence showing that the alleged contemnor actually or constructively knew of the order. Constructive knowledge may be inferred where the person alleged to have been in contempt of the Court order was an alter ego or proxy of the person upon whom actual service was effected. Once the applicant shows that service was actually effected on a person who is reasonably expected to have brought the existence of the Court order to the notice of the contemnor, it is my view that the onus shifts onto the alleged contemnor to show that the existence of the order was not brought to his attention.

39. In this case, this Court stopped the Respondents and any of their members, staff or associates from interfering with the Nairobi County Executive Staff from accessing and performing their duties within that part of City Hall Main Building known as the Northern Wing and occupied by the Rating and Audit departments. From the Report of the Deputy Registrar, the said departments had already moved from the suit premises by the time of her visit. The Respondents contend that they moved out in October, 2016 to make way for renovations which the Deputy Registrar confirmed were actually ongoing.

40. In granting orders of stay, the Court did not direct that those members of staff who had moved from the suit premises whether voluntarily or otherwise to go back therein. What the Court directed was that they be given access thereto to enable them carry out their duties. There is no satisfactory evidence before me on the basis of which I can find that by the time these proceedings were filed on 18th November, 2016, which of the contesting parties were in actual possession of the suit premises. This does not mean that the person who was in possession thereof was lawfully in possession. That is a matter which will have to await the hearing of the substantive motion.

41. With respect to the proceedings before the County Assembly, it is important to revisit the doctrine of parliamentary immunity and whether and how far it applies, if at all, to County Assemblies. That leads me to the provisions of the ***National Assembly Powers and Privileges Act*** (the ***Privileges Act***) as read with the provisions of the ***County Governments Act, 2012*** (the ***CGA***). Section 4 of the ***Privileges Act*** provides:

***No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion***

***or otherwise.***

42. Section 17 of the ***CGA*** on the other hand provides as follows:

***The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly.***

43. It therefore follows that even in the absence of legislation relating to the powers and privileges of the county assemblies, the powers and privileges given to Parliament apply *mutatis mutandi* to County Assemblies. Mercifully, however, such powers and privileges are imported to the county assemblies by section 16 of the ***CGA*** which provides:

***No civil or criminal proceedings may be instituted in any court or tribunal against a member of a county assembly by reason of any matter said in any debate, petition, motion or other proceedings of the county assembly.***

44. Therefore there is no doubt that the county assemblies enjoy the powers and privileges donated to Parliament subject to necessary modifications. The only issue for determination is the extent of such powers and privileges. Before dealing with the extent of the same, it is important to examine the rational for these powers and privileges. In my view the legislative powers and privileges ought to be considered in light of Article 2 of the Constitution under which the Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government and therefore no person may claim or exercise State authority except as authorised under the Constitution. Further under Article 1(1) thereof all sovereign power belongs to the people of Kenya. However by virtue of Article 1(3) this power is delegated to *inter alia* Parliament and the legislative assemblies in the county governments which organs must however perform their functions in accordance with the Constitution. Therefore Parliament and the legislative assemblies in the county governments, in performing their legislative duties can only do that which the people of Kenya can lawfully do and even then that which the people of Kenya have delegated to it. It therefore follows that there are powers which the people of Kenya have reserved unto themselves which Parliament and the legislative assemblies in the county governments cannot purport to exercise. This position was appreciated by the Supreme Court of South Africa in the **Speaker of National Assembly vs. Patricia De Lille MP & Another Case No: 297/98** in which the Court expressed itself as follows:

**"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme - not Parliament. It is the ultimate source of all lawful authority in the country. No**

**Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled."**

45. It is however recognised that in the exercise of the sovereign power of the people delegated to Parliament and the legislative assemblies in the county governments, as long as they exercise the powers bestowed upon them constitutionally must be free to exercise such powers without fear of being hindered or intimidated by other organs of the State. This in my view is the genesis of the privileges and immunities accorded to legislative organs. "Parliamentary privilege" refers more appropriately to the rights and immunities that are deemed necessary for the Legislature, as an institution, and its Members, as representatives of the electorate, to fulfil their functions. It also refers to the powers possessed by the Legislature to protect itself, its Members, and its procedures from undue interference, so that it can effectively carry out its principal functions which are to inquire, to debate, and to legislate. In that sense, parliamentary privileges can be viewed as special advantages which Parliament or the legislative assemblies in the county governments and their Members need to function unimpeded. As stated by ***Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament****:*

**"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively…and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law."**

46. A reading of section 4 of the ***Privileges Act*** clearly reveals that the immunity be it in civil or criminal proceedings is limited to ***words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.*** It is therefore clear that by far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. This right is a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House

without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents.

47. It is however recognised that privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House. It follows that the special privileges of Members are not intended to set them above the law; rather, the intention is to give them certain exemptions from the law in order that they might properly execute the responsibilities of their position.

48. In carrying out their mandate, they however ought to be alive to the principle of separation of powers. They ought not to deliberately set out to demean either the Executive or the Judiciary under the pretext of parliamentary immunity. They ought not to arrogate upon themselves the authority and power which the Constitution entrusts upon the other arms of government. In this respect therefore, they are barred from discussing a matter which is properly the subject of judicial proceedings with a view to either demeaning such proceedings or scuttling the judicial process. I must however clarify that in matters of legislation, nothing bars the legislature during the pendency of judicial proceedings challenging legislation from correcting manifest violation occasioned by such challenged legislation. This however is not a passport to the legislative arm to remove the rug from the feet of the judiciary as it were by changing the law during the pendency of such judicial proceedings with a view to scuttling the judicial process.

49. I have however considered the comments attributed to the 1st Respondent herein, the Speaker of the Nairobi City County Assembly, in the Hansard report of 24th November, 2016. I must say that such concerns coming from a Speaker of a County Assembly are with due respect unfortunate to say the least. The 1st Respondent must be reminded in no uncertain terms that the fact that a person is a zealot in pursuing what he thinks are his legal rights does not make him a vexatious litigant so as to bar him from being heard by a Court of law. As was held by **Madan, J** (as he then was) in **Official Receiver vs. Sukhdev Nairobi HCCC No. 423 of 1966 [1970] EA 243**:

> **"In a court of justice parties are entitled to be heard and to insist upon every possible objection. It would be wrong for this or any other court to refuse to hear an objection even if it appears meritless and tedious. Woe be to the day when this will be allowed to happen. It would be honourable to abdicate from the seat of justice than to allow such a performance of denial to take place. The court may disallow an objection, reject a motion or refuse a plea but it must never refuse to hear it. A court of law is for the preservation not usurpation of rights of the parties."**

50. This Court exists to entertain all persons who feel aggrieved by actions of others and it is not upon the legislature or the executive to tell the Courts which matters to entertain or not to entertain and the manner in which such matters are to be decided. As was appreciated in **Keroche Breweries Limited & 6 Others vs. Attorney General & 10 others [2016] eKLR** for the holding that:

> **"...when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance...From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism."**

51. Similarly in **Masalu and Others vs. Attorney General [2005] 2 EA 165** it was held that:

> **"While it is not disputed that it is the duty of every citizen to play certain roles in a society under Article 17, the judicial officer's role and duties are unique and different. Judicial**

**officers are charged with safeguarding the fundamental rights and freedoms of the citizenry and in the performance of their duties, they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgement or cause them to play into the hands of corrupt elements, especially when there is a climate of political excitement. It is noteworthy that the administration of justice is the firmest pillar of Government……When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim."**

52. The other two arms of government must therefore desist from making comments which may be construed to amount to intimidation of the judiciary or to demean members of the judiciary and bring the rule of law into disrepute. They must continuously be reminded that one of the national values and principles of governance is the rule of law whose tenets include obedience to decisions of Courts of competent jurisdiction.

53. In this case, this Court did not expressly gag the Respondents from debating the conduct the applicant herein generally. If however, the County Assembly purports to take any action against the applicant on the basis of the applicant's invocation of the jurisdiction of this Court, such action would not only be unconstitutional but would amount to abuse of legislative privilege and immunity.

54. Having considered the rivalling arguments as well as the report by the Deputy Registrar, it is my view and I hold that the applicant has failed to meet the threshold required for contempt of Court proceedings to be sustained. It is trite that 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 though not as high as proof beyond reasonable doubt. See **Gatharia K. Mutitika and Two Others vs. Baharini Farm Limited (1982-88) 1 KAR 863.**

55. As a parting shot and while appreciating the substantive motion is yet to be determined, I wish to remind the Executive Committee and the County Assembly of Nairobi City that theirs is a symbiotic relationship geared towards rendering service to the people of Nairobi County. Their roles must therefore be complimentary as opposed to being egocentric. They must be reminded that if they concentrate on squabbles and power games at the expense of rendering service, their very existence may be brought into serious scrutiny.

56. I have said enough to show that the two applications, the subject of this ruling, are unmerited. While I remind the Respondents that the orders granted herein are still in force and must be complied with, the orders sought herein cannot, however, succeed based on the material before me. In the premises the applications dated 25th November, 2016 and 12th January, 2017 are disallowed. The costs will however be in the cause.

57. Orders accordingly.

**Dated at Nairobi this 3rd day of February, 2017**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of:***

***Mr Arnold Ochieng for the Applicant***

***Miss Busienei for the Mr Karanja for the Respondent***

***CA Mwangi***