REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 315 OF 2016

REPUBLIC ….....……....….APPLICANT

VERSUS

THE HONOURABLE ATTORNEY GENERAL…....1ST RESPONDENT

PHILIP NZAMBA KITONGA, SC…….....….INTERESTED PARTY

EX PARTE: COUNCIL OF LEGAL EDUCATION

JUDGEMENT

Introduction

1. By a Notice of Motion dated 3rd August, 2016 the *ex parte* applicant herein **Council of Legal Education,** seeks the following orders:

> **(a) An order of Certiorari to bring into the High Court and quash the Kenya Gazette Notice No. 4631 appointing Mr Philip Nzamba Kitonga as Chairman of the Council of Legal Education for a term of three (3) years;**
>
> **(b) An order of prohibition directed at the President of the Republic of Kenya or any other appointing authority under section 4(5) of the Legal Education Act, 2012 from making appointments or in any other way reconstituting the Council of Legal Education as presently constituted, until determination of Nairobi Civil Appeal No. 149 of 2016 –Council of Legal Education vs. Moi University & Others, and Nairobi Civil Appel No. 148 of 2016 – Council of Legal Education vs. Mt. Kenya University & Others or until further orders of the Court of Appeal.**
>
> **(c) An order for costs.**

Applicant's Case

2. According to the applicant, following the judgement of this Court on 4th April, 2016 in which the Court ordered the reconstitution of the ex parte applicant herein within 60 days, the applicant being aggrieved by the said decision filed a Notice of Appeal and applied for stay of the said decision pending its appeal

to the Court of Appeal.

3. It was averred that pursuant to the said application, the Court of Appeal on 15th June, 2016 ordered that the ex parte applicant's *status quo* as at 15th June, 2016 continue until the determination of the intended appeals which appeals were filed being Civil Appeal Nos. 148 and 149 of 2016 respectively.

4. It was however averred that during the pendency of the said order, the President of the Republic of Kenya, the appointing authority under section 4(5) of the ***Legal Education Act, 2012*** (hereinafter referred to as "the Act") vide Gazette Notice No. 4631 of 24th June, 2016 (hereinafter referred to as "the Gazette Notice") appointed **Mr Philip Nzamba Kitonga**, the interested party herein, as the Chairman of the ex parte applicant effective immediately.

5. It was the applicant's case that the said appointment, made as it was, during the pendency of the said order of the Court of Appeal, was illegal and in gross contempt of the Court hence was a nullity.

6. It was the applicant's contention that since the Court of Appeal has no jurisdiction to quash the said Gazette Notice, it was necessary for these proceedings to be filed.

7. In support of its case, the applicant relied on **Kenya Tea Growers Association vs. Francis Atwoli & 5 Others [2012] eKLR** and **Clarke and Others vs. Chadburn & Others [1985] 1 All E.R. (PC) 211**.

Interested Party's Case

8. According to the interested party, as soon as he was appointed Chairman of the ex parte applicant, the advocates for the applicant notified him that his appointment was illegal due to the pendency of the said orders.

9. To the interested party, at the time of the said appointment, he was unaware of both the proceedings before this Court and in the Court of Appeal hence was unable to determine the precise nature of the "status quo" obtaining as both the applicant and the Respondent had different view on the nature of the *status quo* obtaining.

10. The interested party however averred that he was ready to abide by whatever decision this Court arrives at.

Determination

11. I have considered the issues raised herein.

12. As the Respondent did not respond to the application, the averment made by the ex parte applicant herein remained substantially uncontroverted. In this case, it is contended that on 15th June, 2016, the Court of Appeal ordered that the ex parte applicant's *status quo* as at 15th June, 2016 continue until the determination of the said intended appeals. However, vide Gazette Notice No. 4631 of 24th June, 2016 the President appointed **Mr Philip Nzamba Kitonga**, the interested party herein, as the Chairman of the ex parte applicant. The said appointment was not expressed to be retrospective but was *ex post facto*.

13. The effect of the said appointment, it is clear, was meant to disturb the order of maintenance of *status quo* as was ordered by the Court of Appeal. Article 10 of the Constitution of Kenya provides as follows:

> ***(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(b) human dignity, equity, social justice, inclusiveness, equality,

(c) good governance, integrity, transparency and accountability; and

(d) sustainable development.

14. Under Article 259 of the Constitution the Presidency is a State office. Accordingly, the President is a State officer and is bound by Article 10 of the Constitution which requires him to adhere to, *inter alia*, the rule of law. In my view, it is a principle of the rule of the law that the authority and dignity of the Court be maintained and that parties and their counsel should not take actions that may be deemed to amount to an abuse of the process of Court such as by contemptuously demeaning the judicial process. *The rule of law requires that matters the subject of judicial proceedings be treated with dignity and where a Court of law has issued orders barring further proceedings in question, State or Public officers ought to refrain from making comments or taking actions which may be deemed to be geared towards belittling of such proceedings.* In **Republic vs Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478,** the Court held that:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law."**

15. In **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR, Emukule, J** stated at para 140 that:

> **"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action."**

16. In my view the rule of law decrees that those organs mandated by the Constitution to interpret and apply the Constitution must be respected by all State organs and entities and their decisions as regards the rule of law must of necessity be complied with. Therefore where the Court orders that the prevailing *status quo* be maintained, that order must be complied with and State officers and organs must bow to the same. To fail to do so is to show disrespect to the rule of law. That the Court must at all times uphold the rule of law was held by the Court of Appeal in **Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77** where it was held:

> **"Since the Kenyan nation has chosen the path of democracy rather than dictatorship, the Courts must stick to the rule of law even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the Court's decisions since occasionally those who have been mighty and powerful are the ones who would run and seek the protection of the Courts when circumstances have changed.....The courts must continue to give justice to all and sundry irrespective of their status or former**

status."

17. Lest we forget under Article 1(1) of the Constitution, all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with the Constitution and since the courts are the temples of justice and the last frontier of the rule of law, Court decisions must of necessity be respected and the dignity of the Court upheld at all times. I associate myself with the sentiments of **Rawal, J** (as she then was) in **Charles Lukeyen Nabori & 9 Others Vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331** that the Judiciary as a bastion of the rights of the people is the safeguard and watchdog of the rights, which are fundamental to human existence, security and dignity and that the old school of thought articulated by **Sir Charles Bacon**, that "Judges must be like lions, but yet lions who sit at the feet of the throne" has no place.

18. The people of Kenya in enacting the Constitution recognized in the preamble thereto that they aspired for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 4(1) of the Constitution, declares the national values and principles of governance as the foundation upon which Kenya as a multi-party democratic state is grounded. Under Article 255 of the Constitution the people of Kenya took these values and principles of governance so seriously that they provided that any amendment thereto must be subjected to a referendum. It is therefore clear that an attempt to ignore the same may amount to attempt at usurpation of the powers of the people which the people reserved unto themselves under the said Article 255.

19. 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. See **Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69.** Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993.**

20. In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void. This was the position adopted in **Kenya Tea Growers Association vs. Francis Atwoli & 5 Others [2012] eKLR** in which the Court cited **Clarke and Others vs. Chadburn & Others [1985] 1 All E.R. (PC) 211,** where it was held as follows:

> **"An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others…I need not cite authority for the proposition that it is of high importance that orders of the courts should be obeyed. Willful disobedience to an order of the Court is punishable as a contempt of Court, and I feel no doubt that such disobedience may properly be described as being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done…but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with**

illegality that produced them … even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it."

21. In **Republic vs. The Kenya School of Law & Another Miscellaneous Application No. 58 of 2014,** this Court stated:

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

22. In this case I wish to remind the public in general and the executive in particular of the views expressed by **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** which views I associate myself with that:

"The instant matter is a cause of anxiety because of the increasing trend by Government Ministers to behave as if they are in competition with the courts as to who has more "muscle" in certain matters where their decisions have been questioned, in court! Courts unlike politically minded minister are neither guided by political expediency, popularity gimmicks, chest-thumping nor competitive streaks. Courts are guided and are beholden to law and to law only! Where Ministers therefore by their actions step outside the boundaries of law, courts have the constitutional mandate to bring them back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws… Court orders must be obeyed whether one agrees with them or not. If one does not agree with an order, then he ought to, move the court to discharge the same. To blatantly ignore it and expect that the court would turn its eye away, is to underestimate and belittle the purpose for which Courts are set up."

23. I similarly agree with the decision in **Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013** that:

"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 on 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."

24. The matter cannot be better expressed than in the words of **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."

25. In **Kenya Country Bus Owners Association & Ors vs. Cabinet Secretary for Transport & Infrastructure & Ors JR No. 2 0f 2014** this Court sent a warning in the following terms:

"Where such dishonourable conduct is traced to a State Officer, the consequences are even greater. The Court would particularly be less sympathetic to persons who swear to protect and defend the Constitution and thereafter violate the same with impunity. Our Constitution is still in its infancy. To violate it at this stage in my view amounts to defiling the supreme law of the land and that cannot be countenanced by any Court of law…Court proceedings and orders ought to be taken seriously and that it is their constitutional obligation to ensure that they are regularly appraised of the state of such proceedings undertaken by or against them or on their behalf and orders given by the Court and the Court will not readily accept as excusable the fact that they have delegated those duties to their assistants. Where there are pending legal proceedings they ought to secure proper legal advice from the Government's Chief legal advisers before taking any steps which may be construed as an affront to the Court process or which is calculated to demean the judicial process and bring it into disrepute."

26. As was held by **Musinga, J** (as he then was) in **Robert Kisiara Dikir & 3 Others vs. The Officer Commanding Keiyan General Service Unit (GSU) Post & 3 Others Kisii HCCP No. 119 of 2009**, if we show disrespect to the supreme law of the land, casual observance or breach with impunity by the Government or its servants and fail to punish or penalise those who violate important provisions we, as the temple of justice, will be encouraging such violation. Court orders I must emphasise are not subject to interpretation of the executive. Only Courts of law issuing the orders or Courts of higher jurisdiction are empowered to interpret Court orders.

27. From the material placed before me, it is clear that the Court of Appeal made an order maintaining the *status quo* before the President purported to appoint the interested party as the Chairperson of the ex parte applicant. No doubt the said appointment was clearly made in violation of an existing order of the Court of Appeal and it matters not whether or not the President was aware of its existence. That action must be declared to be null and void. It is as if it was never done in the first place. It is as if it never existed. Consequently the appointment of the interested party, based as it was on a decision that was null and void must similarly be declared to be null and void.

28. Actions which amount to impunity were decried by ***Warsame, J*** *(as he then was) in* **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010** where he cautioned that:

"The new Constitution has enshrined the Bill of Rights of all citizens and to say one group cannot enjoy the right enshrined under the 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. It also raises basic issue of whether a President who has just been sworn in and agreed to be guided by the provisions of the Constitution can allow his agents to breach it with remarkable arrogance or ignorance. All these, are issues which require sober and attentive judicial mind in order to address the rights and obligations of all parties involved...*Prima facie* the allegations contained in this application is serious indictment on the institution of the Presidency and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new constitution. This application is a clear indication that the security arms of this country have not tried to understand and appreciate the provision of this new Bill of Rights. It also shows yester years impunity are still thriving in our executive arm of the government."

29. Kenyans, in enacting the current Constitution, were optimistic that their aspirations would forever hold sway and this was expressed in the judgement of this Court in **Federation of Kenya Women Lawyers (FIDA-K) & Others vs. Attorney General & Others Nairobi HCCP No. 102 of 2011 [2011] eKLR** where a three judge bench expressed itself *inter alia* as follows:

"Only last year and in our early maritime history we constructed a great ship and called it our new Constitution. In its structure we put in the finest timbers that could be found. We

constructed it according to the best plans, needs, comfort and architectural brains available. We tried to address various and vast needs of our society as much as possible. We sent it to the people who ratified it. It was crowned with tremendous success in a referendum conducted on 4th August 2010. We achieved a wonderful and defining victory against the "REDS". We vanquished them. The aspirations and hope of all Kenyans was borne on 27th August 2010. We achieved a rebirth of our Nation. We have come to revere it and even have an affection for it. We accomplished a long tedious, torturous and painful chapter in our history. We all had extraordinary dreams. It is a document meant to fight all kinds of injustices. It is the most sophisticated weapon in our maritime history. As Kenyans we got and achieved a clean bill of constitutional health."

30. In its preamble the Constitution starts off with recognition of 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. In **Olum & Another vs. Attorney General (2) [1995-1998] 1 EA 258**, it was held that the preamble of the Constitution should be given effect wherever it is fairly possible to do so without violating the meaning of the words used.

Order

31. In the result Notice of Motion dated 3rd August, 2016 succeeds and I issue an order of certiorari bringing into this Court and quashing the Kenya Gazette Notice No. 4631 appointing **Mr Philip Nzamba Kitonga** as Chairman of the Council of Legal Education for a term of three (3) years. In my view since there is no evidence that the President will proceed to make any further appointments in violation of the said orders of the Court of Appeal, I see no need to issue the prohibitory orders in the manner sought.

32. There will be no order as to costs of these proceedings.

33. It is so ordered.

Dated at Nairobi this 21st day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Maina for Mr Odhiambo for the Respondent

CA Mwangi