REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 351 OF 2015

IN THE MATTER OF ARTICLES 165 (3) (D) AND 258 THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010

AND

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES 1, 10, 73, 94, 95, 116 (2), 129 AND 153 (4) OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE.....PETITIONER

AND

CABINET SECRETARY FOR DEVOLUTION AND PLANNING .....1ST RESPONDENT

THE HONOURABLE ATTORNEY GENERAL.....2ND RESPONDENT

AND

CENTRE FOR HUMAN RIGHTS AND CIVIC EDUCATION....1ST INTERESTED PARTY

NJONJO MUE.....2NDINTERESTED PARTY

AND

KENYA NATIONAL COMMISSION FOR HUMAN RIGHTS.....AMICUS CURIAE

RULING

Introduction

On 31st October 2016, the Hon. Justice Onguto rendered a judgment in these proceedings decreeing as follows:-

> ***a.*** ***A declaration*** *be and is hereby issued that the Respondent's failure to appoint a date for the coming into operation of the Public Benefit Organization Act, 2013 is in violation of Articles 1, 10, 73, 94, 116 (2), 129 and 153 (4) of the constitution of Kenya, 2010.*
>
> ***b.*** ***A declaration*** *is hereby issued that the decision of the 1 Respondent to appoint a Task Force to amend and or propose amendments to the Public Benefits Organization Act, 2013 before bringing the Act into operation is illegal and ultra vires and otherwise in contravention of Articles 10, 94, 116 (2), 129 and 153 (4) of the constitution of Kenya, 2010.*

c. ***<u>An order</u>*** *of mandamus is hereby issued compelling the 1st Respondent to within the next fourteen days appoint and gazette a date for the coming into operation of the Public Benefits Organizaton Act, 2013 (Act No. 18 of 2013);*

d. ***<u>Each</u>*** *party shall bear its own costs of the petition.*

The period within which the 1st Respondent was to appoint and gazette a date for the coming into operation of the Public Benefits Organizations Act, 2013 lapsed without the said decree being complied with. Further, the functions in relation to the Public Benefits Organization was transferred to the Ministry of Interior and Coordination of National Government shortly after the judgment was delivered. However, the court decree with a penal notice was served upon both the Cabinet Secretary Ministry of Devolution and Planning and also the Cabinet Secretary, Ministry of Interior and Coordination of National Government. Notwithstanding the said service, the court decree has not been complied with to date, necessitating the application for contempt now under consideration.

Application for contempt

On 20th December 2016, the first interested party moved this court seeking orders that the Cabinet Secretary for the time being for Devolution and Planning and or the Cabinet Secretary for the time being for Ministry of Interior and Coordination of National Government jointly and or severally be cited and held to be in contempt of court for disobeying the above judgment and or they be committed to civil jail for disobeying the judgment of this court and that the contemnors do personally bear the costs of the application.

Counsel for the applicant submitted that notwithstanding the fact that the functions relating to Public Benefits Organization were transferred to the Ministry of Interior and Coordination of National Government, *the Government was served with the said decree/judgment and that the Cabinet Secretary for Interior and Coordination of National Government and or the Cabinet Secretary, Devolution and Planning have willfully, deliberately and with impunity disobeyed the judgment of this court and ought to be punished for contempt.*

Counsel for the applicant ably and forcefully submitted that the reasons why power is vested in courts to punish for contempt of court is to safeguard the rule of law which is fundamental to the administration of justice and that the law of contempt has evolved over time to maintain the supremacy of the law and the respect for law and order and that it is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed[1]*and that a party who obtains an order from the court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law and further that a court order once issued binds all and sundry, the mighty and the lowly equally without exception and that an order is meant to be obeyed and not otherwise.*[2] *Citing authorities, counsel correctly submitted that a party must comply with an order whatever he thinks of such an order.* [3]

Respondents case

Counsel for the Respondents submitted that there was no clarity on who was to implement the order since the functions of the ministry were transferred to another ministry shortly after the delivery of the judgment, hence it was necessary for the applicant to move the court to have the decree amended to reflect the correct Respondent. Counsel submitted that the Cabinet Secretary, Ministry of Devolution was not in a position to implement the court order since the functions in question were shortly transferred to another ministry while the ministry it was transferred to was not the one named in the court judgment. However, it is not disputed that both Cabinet Secretaries are aware of the court order, nor was any explanation offered as to why the Public Benefits Organization Act, 2013 has not been implemented to date.

Determination

If the judiciary is to perform its duties and functions effectively and remain true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the courts have to be respected and protected at all costs. Otherwise the very cornerstone of our Constitutional scheme will give way and with it will disappear the rule of law and a civilized life in the society. It is for this purpose that courts are entrusted with the extraordinary power of punishing those who indulge in acts whether inside or outside courts which tend to undermine their authority and bring them in disrepute and disrespect by scandalizing them and obstructing them from discharging their duties without fear or favour. When the court exercises this power, it does so to uphold the majesty of the law and of the administration of justice. The foundation of judiciary is the trust and confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the court by creating distrust in its working the edifice of the judicial system gets eroded.

Clearly, the High Court order still remains in force, hence, I find no difficulty in finding that the Respondents were obliged to comply with the said decision. **It is essential for the maintenance of the rule of law and order that the authority and the dignity of Courts is upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void.**[4]

It must be remembered that court orders must be obeyed at all times in order to maintain the rule of law and good order. This of course means that the authority and dignity of our courts must be upheld at all times and this differentiates civilized societies from those applying the law of the jungle. It is the duty of the Court not to condone deliberate disobedience of its orders nor waiver from its responsibility to deal decisively and firmly with contemnors.[5]

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.[6]

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 realize 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 (as he then was) in ***Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another***[7] 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 judgment. Willful and flagrant disobedience of court orders undermines the authority and dignity of the Courts and must be dealt with firmly so that the Court's authority is not brought into disrepute.

Article 232 of the Constitution further provides for the principles that inform public service. These principles are binding on all State organs, State officers, public officers and all persons whenever any of them applies, or interprets the Constitution; enacts, applies or interprets any law; or makes or implements public policy decisions.

An order passed by a competent court, whether interim or final has to be obeyed without any reservation. The Constitutional Court of South Africa, in *Burchell v. Burchell**[8]* underlined the importance to the rule of law, of compliance with court orders in the following terms:-

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

According to *Black's Law Dictionary;*[9]

> *" Contempt is a disregard of, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."*

In *Halsbury's Laws of England* it is stated:-

> *"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 unless and until it 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 .....an application to court by him not being entertained until he had purged his contempt"*

In book *The Law of Contempt*[10] learned authors **Nigel Lowe** & **Brenda Sufrin** state a follows:-

> *"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."*

In *Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another*[11]**Ibrahim J** (as he then was) stated as follows:-

> *"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 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."*

Rule of law makes it incumbent for all persons, without exception to respect court orders at all times. The whole purpose of litigation as a process of judicial administration is lost if court orders are not complied with. A party who knows of an order whether null or valid, regular or irregular cannot be permitted to disobey it.***[12]*** It would be most dangerous to hold that suitors or their solicitors could themselves judge whether an order was null or valid; whether it was regular or irregular.***[13]***There is need to emphasize that the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process in the normal functioning of courts are not complied with in full by those targeted and / or called upon to give due compliance / effect. A State organ

or agency or person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain.

It cannot be disputed that an order of the court has to be respected by the parties who are bound by it. Therefore every effort must be made to implement the order of the court and not to disobey the same. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as the law permits.

The purpose of this is simple. It is to protect the sanctity of the courts of judicature, which is well envisaged in the Constitution; sustain the confidence in the third arm of government so that all the people who feel aggrieved by government, its agencies or private persons can have a place to run to for a neutral determination. To disregard court orders therefore, among others in my view, is by implication, to set the precedent that people should not believe in the courts. This is wrong because it puts persons in our country on a collision course with no remedy thus creating a medium in which they descend into anarchy by resorting to taking the law into their hands. This is in utter disregard of the democratic and good governance principles and values enshrined in our Constitution.

It is trite that the court will not condone or enforce an illegality. I think it is important to bear in mind that Article **259 (1)** of the constitution enjoins the court to interpret the constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the bill of rights and in a manner that contributes to good governance. This court is obliged under Article **159 (2) (e)** of the constitution to protect and promote the purposes and principles of the constitution. Also, the constitution should be given a purposive, liberal interpretation. I stand guided by the clear provisions of the constitution which is the supreme law of the land which binds all persons and all state organs.[14]

The High Court of South Africa in the case of *Kristen Carla Burchell vs Barry Grant Burchell*[15] held that in order to succeed in civil contempt proceedings, the applicant has to prove **(i)** the terms of the order, **(ii)** Knowledge of these terms by the Respondent, **(iii).** Failure by the Respondent to comply with the terms of the order. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities.[16]

Writing on proving the elements of civil contempt, learned authors of the book *Contempt in Modern New Zealand**[17]*** have authoritatively stated as follows:-

> *"There are essentially four elements that must be proved to make the case for civil contempt. The applicant must prove to the required standard (in civil contempt cases which is higher than civil cases) that:-*
>
> > *(a) the terms of the order (or injunction or undertaking) were clear and unambiguous and were binding on the defendant;*
> >
> > *(b) the defendant had knowledge of or proper notice of the terms of the order;*
> >
> > *(c) the defendant has acted in breach of the terms of the order; and*
> >
> > *(d) the defendant's conduct was deliberate.*

Applying the above tests, and considering the facts of this case, I am persuaded that the Cabinet Secretary, Ministry of Devolution was fully aware of the terms of this order at all material times and it is not sufficient to argue that the docket was transferred to another ministry. He had ample time to comply with the court order before the docket was transferred to another ministry. He was under an obligation to satisfy to the court on the steps (if any) he took to comply with the court order prior to the transfer of the functions to another ministry and also after the transfer of the functions.

Further, the Cabinet Secretary, Ministry of Interior and Coordination of National Government upon taking over the docket in question cannot be heard to state that it was not bound by a court order issued against the ministry by a court of competent jurisdiction prior to the transfer of the functions to his ministry nor can the Cabinet Secretary hide behind such an excuse to avoid implementing a lawful court order.

Rule **3** of The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013[18] provides that the rules shall be interpreted in accordance with Article **259 (1)** of the constitution and shall be applied with a view to advancing and realizing the *(a) rights and fundamental freedoms enshrined in the Bill of Rights; and (b) values and principles in the constitution.*

Rule **8** provides that nothing in the rules shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The constitution is an effective document that is the basis of our laws. *Considering the principles, purposes and objectives of the constitution enumerated above, I find myself unable to uphold the argument advanced by the Respondents that it was necessary to amend the court decree for them to implement a court order they are fully aware of and whose terms are not disputed. To me, that is a mere excuse aimed at avoiding implementing a valid court order.*

*I find that **(a)** the Cabinet Secretary Ministry of Devolution willfully disobeyed a valid court order, **(b)** that the Cabinet Secretary, Ministry for Interior and Coordination of National Government has also without any lawful cause failed, refused and or neglected to comply with a valid court order. However, rather than commit the two for contempt of court as prayed, I will instead, in exercise of my discretion, pursuant to rule 8 cited above, order that the decree herein be amended substituting the name of the Cabinet Secretary, Ministry of Devolution with Cabinet Secretary, Ministry of Interior and Coordination of National Government.*

My aforesaid decision is premised by the clear and the true construction of the law and from established practice that the court has a wide discretion to do what is just and reasonable in the circumstances to ensure proper administration of justice.[19] Talking about discretion, it is important to bear in mind that the court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[20] The inherent power, as observed by the Supreme Court of India[21]"*has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it."* The fundamental duty of the court is to do justice between the parties. Discussing the nature and objects of the inherent powers of the court, *Sir Dinshah Mulla* in *The Code of Civil Procedure*[22]observes that:-

> *".... The court has, therefore, in many cases, where the circumstances so require, acted upon the assumption of the possession of an inherent power to act **ex debito justiciae**, and to do real and substantial justice for the administration, for which alone, it exists...."*

Discretion vested in the court is dependent upon various circumstances, which the court has to consider among them the peculiar facts of each case and the need to do real and substantial justice to the parties to the suit[23] and that discretion must be exercised in accordance with sound and reasonable judicial principles including the interests of justice and the need to uphold the rule of law.

In the final analyses, I find that the interests of justice will be met if I make the following orders:-

> ***a. That** the first Respondent herein, be and is hereby substituted with the Cabinet Secretary, Ministry of Interior and Coordination of National Government.*
>
> ***b. That** all the court documents in these proceedings including the judgment of this court dated 31st October 2016 and the decree issued pursuant to the said judgment dated 31st October 2016 be and are hereby amended accordingly to reflect the Cabinet Secretary, Ministry of Interior and*

Coordination of National Government as the first Respondent.

***c. <u>That</u>** the Cabinet Secretary, Ministry of Interior and Coordination of National Government is granted **<u>thirty (30) days</u>** from the date service of this order to comply with the judgment rendered by this court on 31st October 2016, in default, he will be liable to be committed for contempt of court for such period of time as the court shall determine and or deem fit and just in the circumstances.*

***d. <u>That</u>** a certified copy of this ruling, the order and the judgment rendered on <u>31st October 2016</u> be served upon the Honourable Attorney General.*

***e. <u>That</u>** no orders as to costs.*

Orders accordingly.

Signed, Delivered and Dated at Nairobi this **12th** day of **May** 2017

John M. Mativo

Judge

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[1]Africa Management Communication International Limited vs Joseph Mathenge Mugo & Another, Pet No. 242 of 2013

[2] Ibid

[3]Counsel cited Hadkinson vs Hadkinson {1952}2 All ER 567

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

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

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

[7]**Nakuru HCCC No. 247 "A" of 2004**

[8]Case No 364/2005

[9]9th Edition, page 360

[10] Butterwoths {1996} Pages 555-569

[11] {2005} 1KLR 828

[12] Wild Life Lodges Ltd v. County Council of Larok and anor, {2005} Vol 2 EALR p.344.

[13] See also Chuck v. Cremer (1) Corp Temp 442.

[14] See Article 2 (1) of the constitution

[15] Eastern Cape Division Case No. 364 of 2005

[16] Ibid, at page 4

[17] Available at *ip36.publications.lawcom.govt.nz*

[18] Supra

[19] Bayer AG v Winter and others[1986] 1 All ER 733

[20] See Mamraj vs Sabri Devi, AIR 1999 P & H 96

[21]in Raj Bahadur Ras Raja vs Seth Hiralal, AIR {1962} AC 527

[22] 18th Edition Reprint 2012

[23] See Sir Dinshah F. Mulla, Supra, at page 1381.