



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI LAW COURTS
CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION
JR. NO. 187 OF 2014

IN THE MATTER OF AN APPLICATION BY THE APPLICANTS, EDWARD MUTINDA NDETEI, PENINAH MASAI, STEPHEN WARUI KABUGI, ANTHONY KISINA MBUVI, TERESIA LEMA KIIO, PILISILA M. WAMBUA, VERONICA MUTUAL, JAMES MUTUAL MUTHOKA, WANYUA THANZA, TABITHA MUTE, JOYCE MWASIAYA, PETER MUTISO KIMUYU, NDILA K. MAVIA, DANIEL MAKAU MWOLOLO, DAMSON MWALIMU MAKENGA AND ELIZABETH MBULA TO APPLY FOR AN ORDER OF COMMITTAL FOR CONTEMPT OF COURT DIRECTED TO THE DIRECTOR OF LANDS AND URBAN PLANNING, GOVERNMENT OF MAKUENI COUNTY

AND

IN THE MATTER OF ORDERS MADE BY HONOURABLE JUSTICE ODUNGA IN THE HIGH COURT OF KENYA, IN JUDICIAL REVIEW CASE NUMBER 187 OF 2014 ON 20TH MAY 2014 DIRECTED TO THE DIRECTOR OF LANDS AND URBAN PLANNING, GOVERNMENT OF MAKUENI COUNTY

RULING

Introduction

1. By a Notice of Motion dated 24th October, 2014, the *ex parte* applicants herein seek the following orders:
 1. That this Honourable court be pleased to find Director of Lands and Urban Planning, Government of Makueni County in contempt of the order of honourable Justice Odunga in the High Court of Kenya, judicial Review Case Number 187 of 2014 on 20th May 2014
 2. That the said Director of Lands and Urban Planning, Government of Makueno County be arrested and committed to prison for a term not exceeding six (6) months.
 3. That this Honourable Court be pleased to order that the said Director of Lands and Urban Planning, Government of Makueni County not be heard by the court until he purge the contempt.
 4. That this Honourable Court be pleased to issued such other or further punitive orders in respect of the said contempt as may be necessary for the ends of justice to be met.
 5. That the costs of and occasioned by this application be costs in the cause.

Ex Parte Applicants' Case

2. The application was supported by a supporting affidavit sworn by **Edward Mutinda Ndeti**, one of the Applicants herein, on 24th October, 2014.
3. According to the deponent, on 20th May 2014 this Court granted orders in the following terms:
 - a. **That leave be and is hereby granted to the Applicants to apply for Judicial Review by way of an order of Prohibition directed to the Director of Lands and Urban Planning of the Government of Makueni County and/or through his officers, agents or any other person claiming under him prohibiting him from enforcing the enforcement notices dated 7th May 2014 and issued by his office on 6th May 2014.**
 - b. **That in the meantime there be a temporary stay of the impugned enforcement notices till then or until further orders of the court.**
4. The said orders, according to the deponent, were served upon the Respondent on 21st May 2014 and subsequently consent orders were between the parties herein that the said order of stay of the notices would remain in force until the hearing and determination of the application. In the deponent's view, the effect of the order was to stop the intended demolition of the buildings and structures erected on the suit premises pending the hearing and determination of application and that the essence of the order was further to maintain the *status quo* obtaining on the ground to wit the buildings would remain standing (and not be demolished).
5. However, despite service of the said order on the Respondent, the Respondent, his agents, servants or persons claiming under in flagrant abuse and disobedience of the said order proceeded to demolish the structures on the ground during which time the deponent called **Emmanuel Mwagambo** advocate who has conduct of this matter on behalf of the Applicants and informed him. Despite the said advocate seeking an explanation thereon from the Makueni County Council Advocate one **Mr. Mulei**, the said demolitions however continued unabated and the debris and rubble on the ground was carted away by agents of the Respondent to the exclusion of the owners of the stone and other damaged building material.
6. It was further disclosed that on 22nd July, 2014, **Emmanuel Mwagambo**, received a call from one **Judy Kalinga**, the Minister for Lands and Urban Planning, Makueni County through mobile phone number 0723657875 who indeed confirmed that the Order was received but the recipient at the office had not notified them of the same. That notwithstanding, as a continual disobedience of the court order, the Director of Lands and Urban Planning through his agents continued to cart away the debris and rubble on the suit property and even began laying stone and sand on the premises ostensibly to construct a market place for the locals. Further, the County Government had in clear, flagrant and macho defiance of the specific orders of this court been categorical that they would in any event proceed with their intended development plans in the area.
7. The deponent disclosed that he had in his possession an extract of the hansard of the proceedings of the sitting of the County Assembly of the County Government of Makueni which found that the Order had in fact been properly served but had however been defied.
8. As a result of the said contemptuous actions, it was contended that the applicants have been gravely prejudiced and been denied a source of livelihood and left desolate hence the orders sought herein.

1st Respondent's Case

9. In opposition to the application, the Respondents filed a replying affidavit sworn by **Morris M. Mulei**, the Respondent's Advocate on 9th December, 2014.
10. According to the deponent, the Applicant's counsel forwarded to him an email on 22nd May attaching the orders issued by this honourable court on 20th May 2014, but by that time he had not yet been instructed to act for the Respondent in this matter, which only happened on 27th May 2014.
11. In his view, the only reason that counsel sent him the email was because he was aware from

- previous interactions that deponent had represented the Makueni County Council previously, and when he called the deponent in the afternoon on 22nd May to seek clarification, the deponent informed the applicant's advocate that he was unaware about the matter, but requested for a copy of the order to enable him make inquiries from the County Government. On the morning of 23rd May 2014 when the deponent opened his mailbox, he saw the attached copy of the order whereupon he contacted **Judy Kalinga**, the County Executive Committee Member for Lands and Urban Planning, a personal friend and professional colleague who confirmed that there was some work going on at Emali but stated that she was not aware of any court order.
12. According to the deponent, by sending a copy of a court order by email to an advocate who is not on record for a party does not constitute service and the mention of his name and his firm in the supporting affidavit is in bad taste and *mala fides* to say the least. To him, this confirms to the court from an independent perspective that the office of the director was certainly not aware of the court order by the time of the email. It also confirms that the allegation in the affidavit that the Applicant's counsel spoke with **Mrs Kalinga** on the afternoon of the 22nd of May is not true since the 2 advocates did not know each other as at that time.
 13. There was also a replying affidavit sworn by Kenneth Ngeny, the Director of Lands and Urban Planning, Makueni County on 5th June, 2011.
 14. According to him, the Respondent discovered that the Applicants together with other allottees had encroached into road reserves and other public utilities and erected thereon illegal structures. The said structures had also been built without approval by the Government of Makueni County, or the then County Council of Makueni (hereinafter called "the government"). He deposed that the Government, pursuant to the provisions of Section 38 of the **Physical Planning Act**, Cap 286 Laws of Kenya issued notices to the affected parties and that the applications herein were not the only affected persons and others served with the notice peacefully removed the illegal structures.
 15. To the Applicant, if the Applicants herein felt aggrieved by the notices, their recourse laid in an appeal to the Liaison Commission under Section 38 (4) and (5) of the **Physical Planning Act** and that recourse to the High Court can only come as an appeal against a decision of the National Liaison Committee pursuant to Section 38(6) of the **Physical Planning Act** and as such this case is not properly before this court as all mechanisms provided under the act have not been explored. He added that the Applicants had not displayed before this court any approved development plan which confirmed that they sought equity with unclean hands. To him, the approved plan annexed to the affidavit of **Edward Mutinda Ndeti** was not in respect to any of the Applicants before this court and that these Applicants had not even demonstrated any application for approval of building plans and hence sections 30 and 31 of the **Physical Planning Act** had been flouted. It was asserted that this court cannot oust the express provisions of a statute and as such the orders sought cannot issue.
 16. The deponent disclosed that the allotment letters issued to the Applicants have various conditions attached to them and the same cannot confer any right upon the Applicants unless the same have been satisfied. In any case the allotment letters issued to the Applicants were irregularly and/or unlawfully issued, and do not specify any area of allocation hence it was impossible to say that those allotment letters relate to the area in question. To him, the payment of ground rent and other outgoings to the government cannot grant or be construed to be an approval or acquiescence to the constructions of illegal and unapproved structures and that under Clause 3 of the notices, all the Applicants needed to do was to prove their approvals to the government before the expiry of the notice and their failure to do so occasioned the demolition. He averred that the receipt of ground rent and other outgoings by the government cannot estop them from demolishing unapproved structures as that would be using the court process to sanction all illegality.
 17. The deponent averred that the notices given to the Applicants were in conformity with the **Physical Planning Act** and cannot be said to have been unlawful as alleged to sanction an illegality. In his view, the Applicants could not state that they were not given an opportunity to be heard yet the notice gave them an opportunity to present their case and they failed to take up the opportunity.
 18. It was contended that by the time the court papers and order were received in the Respondents' offices, demolition had already happened and it was only removal of the rubble and debris that was pending and that only one old building remained hanging precariously which posed a danger to the general public and which ought to be demolished as well.

Determinations

19. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.
20. It is important to reiterate the current procedure for an application for contempt in circumstances such as in this case.
21. At this stage, it is important to revisit the procedural legal provisions guiding the process of committal in this Country. The first port of call with respect to the procedure for institution of contempt of Court proceedings in this country is section 5 of the *Judicature Act* Cap 8 Laws of Kenya. That section provides:

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

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

22. Therefore the law that governs contempt of court proceedings is the English law applicable in England at the time the contempt was committed. The procedure in the High Court of Justice in England was considered in detail by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court recognised that the only statutory basis for contempt of court law in so far as the Court of Appeal and the High Court are concerned is section 5 of the *Judicature Act*.
23. The High Court of Justice in England comprises three (3) divisions – the Chancery, the Queens Bench and the Family Divisions. It is true that following the implementation of **Lord Woolf's "Access to Justice Report, 1996"**, the *Rules of the Supreme Court* of England are being replaced with the *Civil Procedure Rules, 1999* and pursuant thereto the Court of Appeal in the above decision recognised that on 1st October, 2012 the *Civil Procedure (Amendment No. 2) Rules, 2012*, came into force and Part 81 thereof effectively replaced Order 52 of the *Rules of the Supreme Court* which was the Order dealing with the procedure for seeking contempt of Court orders in the High Court of Justice in England, in its entirety. Under Rule 81.4 which deals with breach of judgement, order or undertaking, referred to as "application notice", the application is made in the proceedings in which the judgement or order was made or undertaking given and the application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. The Court of Appeal held that leave or permission is no longer required in such proceedings (relating to a breach of a judgement, order or undertaking) as opposed to committal for interference with the due administration of justice or in committal for making a false statement of Truth or disclosure statement.
24. It must however be remembered that Court orders are not made in vain and are meant to be complied with. If for any reason a party has difficulty in complying with court orders the honourable thing to do is to come back to court and explain the difficulties faced by the need to comply with the order. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal. In **Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J** (as he then was) stated:

"It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown

by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void”.

25. This position was confirmed by the Court of Appeal in Refrigerator & Kitchen Utensils Ltd. vs. Gulabchand Popatlal Shah & Others Civil Application No. Nai. 39 of 1990. In Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK) the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice... Justice dictates even-handedness between the claims of parties; and if it be the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court... Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

26. In Central Bank of Kenya & Another vs. Ratalil 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.

27. 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...”

28. 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.”

29. 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.”

30. In this case, the Respondent does not dispute that the act complained of took place. Rather his defence to the application is that by the time of the demolition, no Court order had been served on him. The Applicants have exhibited a copy of the affidavit of service which purports that the order was served on “the clerk” on 21st May, 2014. However the actual document which was allegedly served and received was not exhibited. Apart from the affidavit of service, the Applicants have exhibited a copy of the Ad Hoc Committee on Emali Town Demolitions Investigation of the Makueni County Assembly in which the process server was purportedly interviewed by the members of the said committee. Apparently there was wrong dating of the receipt of the said order and that the correction was not effected until 22nd May, 2014. The Committee’s findings were that the demolitions continued upto 23rd May 2014 late in the evening.
31. From the affidavit sworn by **Morris M. Mulei**, the Respondent was or ought to have been aware of the existence of the Court order by latest 23rd May, 2014 in the morning when, **Judy Kalinga**, the County Executive Committee Member for Lands and Urban Planning’s attention on the existence of the Court order was brought home to her. So that even without relying on the affidavit of service exhibited herein, the Respondent ought to have taken steps as at that date to halt the demolitions. No affidavit has been sworn by the said **Judy Kalinga** on the steps she took after getting knowledge of the existence of the Court order. There is undisputed evidence on record that the demolitions took place till late evening on 23rd May, 2014. There is no attempt to explain why this illegal action was proceeded with let alone spiriting away the rubble and debris from the site without affording the applicants the opportunity to salvage whatever they could therefrom.
32. Therefore the Respondent cannot be heard in these proceedings to contend that it was unable to comply with the Court order because by the time the same was brought to its attention, the actions restrained had been undertaken in light of the contention by the Applicant which is not denied that the Respondent continued to cart away the debris and rubble to the exclusion of the owners of the stone and other damaged building material. The best the Respondent would have done was to stop any further action on the suit land and come back to court for variation or setting aside of the order. In the premises I find the Respondent’s conduct of not complying with the orders of this Court on the ground of inability to do so inexcusable.
33. This Court is however aware of the principle in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004** where **Musinga, J** (as he then was) recognized that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement; that contemnors undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute. The Judge was, however of the view, which view I respectfully share, 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 not open to the objection of arbitrariness, and which can be brought to bear upon the subject. That said, it must, however 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.
34. It was further contended that there is no evidence that the Respondent was served with the order and the penal notice. The general rule is that where a party is seeking committal to civil jail against the other party on the grounds that the order delivered by the court has been disobeyed, the party sought to be committed or cited for contempt must be personally served with a properly extracted order which must have a Penal Notice appended to it. See **Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708.**
35. Where it has been brought to the Court’s attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, this Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs.**

Baharini Farm Ltd. [1985] KLR 227:

“It is quite clear on the authorities that anyone who, knowing of an injunction, or an order of stay, wilfully does something, or causes others to do something, to break the injunction or interfere with the stay, is liable to be committed for contempt... The reason is that by doing so he (or she) has conducted himself (or herself) so as to obstruct the course of justice and so has attempted to set the order of the court at naught.”

36. 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.”

37. 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.”

38. 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.”

39. 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.”

40. In my view the County Government of Makueni conducted itself in a most despicable manner not expected in this era. It failed to appreciate that with the current Constitution, Kenyans moved away from acts of hooliganism and impunity to values and principles of the rule of law, human dignity, integrity, transparency and accountability. This Court will where persons take upon themselves to brazenly disregard its orders take appropriate steps to ensure that its dignity is maintained. This is a case where as appreciated by **Musinga, J** (as he then was) in **Republic vs. Minister of Medical Services** (supra) the Respondent’s conduct is “*no more than a subterfuge – a seemingly clever explanation or trick intended to justify the contemptuous acts complained of.*”
41. I am therefore satisfied that the Respondent without any reasonable excuse failed to comply with the orders of this Court and I hold that he was in contempt of Court.
42. The values and principles of governance which are expressly laid out in our Constitution in Article 10 thereof must never be given casual observance or breached with impunity by the Government whether at national or at county level or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010:**

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

43. I must send a strong message to those who are intent in disobeying Court orders that such conduct will not be tolerated no matter the status of the contemnors in the society. The law as articulated by **Montesque**, “should be like death which spares no one”. When persons in authority themselves set out to disobey Court orders with impunity they must remember that they are sending wrong signals to ordinary Kenyans that it is proper to disobey Court orders with impunity which is a recipe for chaos. Such conduct must therefore be nipped in the bud as soon as it is detected. In my view contempt of Court is such a grotesque monster that the courts should hound it wherever it rears its ugly head and wherever it seeks to take cover behind any craft or innovation. As was held by the Court of Appeal in **Central Bank of Kenya & Another vs. Ratalal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law.
44. Therefore it is my view and I so hold that those who disobey Court orders risk being declared by the Court to have breached Article 10 of the Constitution which prescribes national values and principles of governance with the attendant consequences among other appropriate sanctions.
45. Therefore in order to maintain the rule of law and in order that the authority and the dignity of our Courts are upheld at all times and to stamp the authority of this Court and ensure the values and principles of governance enshrined in Article 10 of the Constitution are adhered to, I hereby direct the Respondent to personally appear before this Court to explain why appropriate sanctions ought not to be taken against him in light of his disapproving conduct.

Dated at Nairobi this 2nd day of July, 2015

G V ODUNGA

JUDGE

In the presence of:

Mr Mwagambo for the Applicants

Mr Nyamu for the Respondent

Cc Patricia