REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.311 OF 2012

BETWEEN

OKIYA OMTATAH OKOITI…….…..PETITIONER/APPLICANT

AND

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

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION…….....….2ND RESPONDENT

RULING

1. The Petitioner's Notice of Motion before me is dated 10th April 2014. It seeks *inter alia* an order to commit the 1st Respondent, the Attorney General, to civil jail for a term not exceeding six months and payment of an exemplary personal fine for contempt of Court for refusing to comply with the order issued on 26th September 2012 by Majanja J.

2. The Application is premised on the grounds generally that the 1st Respondent has refused to obey the order issued on 26th September 2012 which directed him to respond to the Petitioner's letter dated 17th August 2012 within 21 days. The Petitioner claimed that the failure to do so has gravely inconvenienced him by making it impossible for him to amend his Petition.

3. The Petition submitted in the above regard that the 1st Respondent has made unsupported claims that he has tried but failed to get the Ministry of Finance to comply with the orders of the Court. That therefore having failed to demonstrate to the Court that he had discharged his mandate under **Article 156(6)** of the **Constitution 2010** and since the orders were personally directed at the 1st Respondent and not the Permanent Secretary, Ministry of Finance, the former was in contempt of Court.

4. Further, even if the Permanent Secretary, Ministry of Finance had failed to act, the 1st Respondent had failed to take steps in the public interest to cure the contempt of Court that was committed by the said Permanent Secretary.

5. He added that it was the duty of every person, no matter his status, against or in respect of whom a

Court order has been issued, to obey it. In that regard, he relied on the case of ***Martin Nyaga Wambora & 4 Others vs Speaker of the Senate & 6 Others (2014) e KLR*** where the Court held that disobedience of a Court order was a grave issue and undermined the rule of law.

6. For the above reasons, the Petitioner urged the Court to grant the orders sought.

7. In opposing the Application, the 1st Respondent filed an Affidavit sworn by Ms. Stella Munyi, Senior Deputy Litigation Counsel at the 1st Respondent's office. She deposed that the Application is an abuse of the Court process and is also fatally defective.

8. She further deponed that upon receipt of the orders of the Court on 26th September 2012, on behalf of the 1st Respondent, she wrote to the Ministry of Finance forwarding the Petitioner's letter dated 17th August 2012 and also sought to be supplied with the documents that the Petitioner had requested for. She also wrote a reminder to the said Ministry on 24th January 2013 but received no response.

9. Mr. Moimbo, learned State Counsel in addition to the above, submitted that the applicable law for punishing any person for contempt of Court is set out in **Section 5** of the **Judicature Act (Cap 8 Laws of Kenya)** and that the procedural law is set out under the **English Civil Procedure (Amendment No. of 2) Rules 2012** and specifically **Rule 81** thereof and one of the requirements therein is that one must obtain leave for filing an application for orders of contempt. He claimed that in that regard the Petitioner's Application was fatally defective because he did not obtain leave of the Court as required and did not personally serve the alleged Contemnor with the Court order or a notice of penal of the consequences of disobedience neither did he serve him with the Application for contempt. He relied on the case of ***Christine Wangari Gachege vs Elizabeth Wanjiru Evans & 11 Others (2014) e KLR*** in support of those submissions.

10. He further submitted that the Court decision leading to the orders in issue was a Ruling delivered on 26th September 2012 and since the same was not a judgment, an order or undertaking as contemplated by **Rule 81.4.,** no contempt of Court orders could properly issue.

11. On personal service, he further submitted that **Rule 81.5** as read with Rule **81.6** of the **English Civil Procedure (Amendment No. 2) Rules 2012** provides for service of an order to be made personally. He claimed that there was no indication that the order was served upon the alleged contemnor neither was he served with the attendant penal notice and as a result the Application ought to be struck out for want of service.

12. Mr. Moimbo also contended that **Section 8** of the **Office of the Attorney General Act, 2012** bars the commencement of any civil or criminal proceedings against the Attorney General in respect of any proceedings in a Court of law or in the course of discharging the functions of the said office under the **Constitution** and the **Act**. That the 1st Respondent in the instant proceedings was merely discharging his constitutional mandate and was not *per se* a party to the Petition since he is acting for the Permanent Secretary, Ministry of Finance and as the advocate on record by dint of **Section 8** of the **Office of Attorney General Act,** no contempt proceedings should succeed as against him or officers working under his direction.

13. In any event, Mr. Moimbo went on to claim that the office of the 1st Respondent had done its best to procure the information sought by the Petitioner. That he sent two letters dated 26th September 2012 and 24th January 2013 to his client, the Ministry of Finance and that those letters demonstrated that the 1st Respondent made *bona fide* efforts to ensure that the Court orders were obeyed.

14. For the above reasons, Mr. Moimbo urged the Court to dismiss the Application with costs.

15. Having considered the rival submissions, it is not in dispute that on 26th September 2012, Majanja J gave an order in the following terms;

"The 1st Respondent shall ensure that an appropriate response is given to the Petitioner's letter dated 17th August 2012 from the Kejude Trust to the Minister of Finance within the next 21 days from the date hereof".

16. To breakdown the above order, what were its ingredients? They were as follows;

(i) The 1st Respondent was to ensure that an appropriate response is given to the Petitioner's dated 17th August 2012.

(ii) The said letter had not been addressed to him but to the Minister of Finance.

(iii) The 1st Respondent was to comply with (i) above within 21 days.

17. With the above facts in mind, what is the law on contempt? The statutory basis for contempt of Court is to be found in **Section 5** of the **Judicature Act** which provides as follows;

"(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."

18. Previously, as I understand it, the procedure for commencing contempt of Court proceedings as it relates to the High Court in England was to be found in **Order 52** of the **Rules** of the **Supreme Court** made under the **Judicature Act of 1973** which provided as follows;

"(i) An application to the High Court of England for committal for contempt of Court will not be granted unless leave to make such an application has been granted.

(ii) An application for leave must be made ex parte to a judge in chambers and be supported by a statement setting out the particulars of the applicant as well as those of the person sought to be committed and the grounds on which committal is sought, and by an Affidavit verifying the facts relied on.

(iii) The applicant must give notice of the application for leave not later than the preceding day to the Crown office.

(iv) Where an application for leave is refused by a judge in chambers the applicant may apply afresh to a divisional court for leave within 8 days after the refusal by the judge.

(v) When leave has been granted, the substantive application by a motion would be made to a divisional court.

(vi) The motion must be entered within 14 days after the granting of leave; I not, leave shall lapse.

(vii) The motion together with the statement and affidavit must be served personally on the person sought to be committed, unless the Court thinks otherwise."

19. However the above procedure may not ascertain the prevailing state of the law of contempt in England today because recently, in 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** in its entirety**. Part 81** (Applications and Proceedings in Relation to Contempt of Court) provides a different procedure for four different forms of violations. Of relevance in these proceedings is **Part 81. 4** which relates to committal for ***"breach of a judgment, order or undertaking to do or abstain from doing an act".***

20. The current procedure in England, as I understand it, is that firstly, an application under **Rule 81.4** is made in the proceedings in which the judgment or order was made or the undertaking given. The Application must then set out fully the grounds on which the committal application is made and must identify separately and numerically each alleged act of contempt and be supported by an affidavit containing the evidence relied upon.

21. My reading of the above Rule, is therefore that the requirement for leave is not necessary where committal proceedings relate to a breach of judgment, order or undertaking within the same proceeding - See ***Christine Wangari Gachege vs Elizabeth Wanjiru Evans (supra).*** It is also therefore clear that the Petitioner has satisfied the requirement that the application for committal should set out the alleged act of contempt and be supported by an affidavit containing the evidence relied upon.

22. Secondly, in the English Rules, an application for contempt orders together with any supporting affidavits must be served personally on the Respondent unless the Court dispenses with service if it is just to do so or the Court authorizes an alternative method or place of service. On this aspect, it was Mr. Moimbo's submission that the Petitioner had failed to serve the Attorney General personally with the application for contempt. On his part, Mr. Okoiti submitted that the Attorney General was aware of the Court order as it was issued in Court in the presence of Miss Munyi. That being so the larger question I must answer is whether the 1st Respondent ought to have been personally served with a Court order together with a penal notice before contempt orders can be issued against him.

23. Generally, the law on disobedience of Court orders, is that contempt orders cannot be made unless there is evidence of personal service. In the case of ***Kariuki & 2 Others vs Minister for Gender, Sports, Culture and Social Services & 2 Others (2009) e KLR*** this Court expressed itself as follows;

> ***"....But in our law, service is higher than knowledge and since the service here was frustrated....I shall hold in accordance with the existing law that there was no service"***

Subsequently and following developments in case law in ***Kenya Tea Growers Association vs Francis Atwoli & 5 Others Petition No.64 of 201*0** the Court opined as follows;

> ***"In the case before me, I am more than satisfied that even at the higher level beyond reasonable doubt, when an individual has been served with and/or has knowledge of a court order but not only ignores it but in fact incites others to do the same, the threshold for contempt has been met. Francis Atwoli in fact went further to arrogate himself the decision to determine when the strike should end despite the fact that the court order had stopped it. He went further to interpret it as made without jurisdiction and that only the workers court (Industrial Court) had jurisdiction to determine the matter. He did not do so once but on a number of occasions as he flew by helicopter from place to place on 18th October 2012. His contempt was obvious and his conduct and words can attract no other finding."***

24. I reiterate the above finding and the point is that where a party clearly acts and shows that he had knowledge of a Court order then the strict requirement that personal service must be proved is rendered unnecessary.

25. In the context of the present Application, I say so because the orders were made in open Court by Majanja J and the record would show that Ms. Munyi, acting for the 1st Respondent, was present in Court at the time. Why would personal service be necessary in the circumstances? Why would a penal notice also have to be served on the **"principal legal adviser to Government?"** Mr. Moimbo's submission on these issues were off the mark and are rejected.

26. Having so said, do the facts disclose that the orders of Majanja J were blatantly disobeyed by the 1st Respondent as alleged by the Petitioner? To answer that question, the said orders must be put in context. What happened was that the Petitioner wrote a letter dated 17th August 2012 to the Permanent Secretary, Ministry of Finance and requested for certain information on the alleged payment of Kshs.3.9 Billion in the acquisition of Biometric Voter Registration (BVR) kit to be used prior to the 2013 General Elections. In his Ruling of 26th September 2012, Majanja J partly stated as follows;

> ***"Prayer 7 seeks information from the 2nd Respondent and the Minister of Finance. Article 35 entitles the Petitioner to information from the State. Such information was requested by the Petitioner in the letter dated 14th August 2012 addressed to the Minister for Finance. There is no indication that the letter has been dealt with and it would be proper for the Minister to address himself to the information requested before the Court exercises its coercive powers. In the circumstances, I direct the 1st Respondent to ensure that an appropriate response is given to the Petitioner within the next 21 days."***

27. What did the 1st Respondent do in compliance thereof? Ms. Munyi exhibited two letters that she wrote to the Permanent Secretary, Ministry of Finance, seeking the information that the learned Judge had directed the 1st Respondent to supply. To date, she has received no response to her letters. Can the 1st Respondent be said to have refused to comply with the order and is therefore in contempt? I think not.

28. In **AG vs Punch Ltd [2002] UKHL 50,** Lord Nicholls described contempt of Court as ***"the established, if unfortunate, name given to the species of wrongful conduct which consists of interference with the administration justice."*** Lord Diplock in **AG vs Leveller Magazine Ltd [1979] AC 440 at 449** had earlier stated that ***"it is justice itself that is flouted by contempt of Court, not the individual Court or judge who is attempting to administer it."***

29. It is obvious to me that taking the above expositions of what contempt of Court really means, the 1st Respondent cannot be said to have subverted the administration of justice. I say so because nowhere in his Ruling did Majanja J state that the 1st Respondent was the one to respond to the Petitioner's letter. He was merely supposed to **"ensure"** such that a response was given by the Minister of Finance to whom the Petitioner's letter was addressed. How else could he so **"ensure"** unless he wrote, as he did, to the Minister of Finance, through his Permanent Secretary, asking for compliance? How can he then be found to have failed to comply when he did all that he could do in the circumstances?

30. It must be appreciated that contempt of Court is a serious matter and that if one is found guilty of it, he may land in jail. The burden of proof in the circumstances is that much higher and it is clear to me that it has not been met in the present case.

31. Before I make final orders, one other peripheral but important issue was raised by Mr. Moimbo i.e. whether the Attorney-General can, as an advocate, be amenable to contempt orders. My simple answer to that question is that under **Article 157(11)** of the **Constitution** and as the custodian of public interest in judicial proceedings, he is in fact the one who ought generally to institute contempt of Court proceedings in civil matters as should the Director of Public Prosecution in criminal matters, where the Court brings it their attention that there may be contempt of Court even if a party chooses not to. However, like any Minister (or Cabinet Secretary), where it is his own conduct qua Minister (or Cabinet Secretary) that is in question, then he is amenable to contempt orders. I say so because as early as 1765 in **Eritiok vs Camington (1765) 19 St. Tr.1030,** Wilmor CJ stated as follows;

> ***"The law makes no difference between great and petty officers, thank God they are all amenable to justice."***
>
> **(**See also **Re M: M vs Home Office [1994] 1 A. C. 377)**

32. That is all I have to say on that peripheral issue but having so found, it follows that I am unable to

hold that the 1st Respondent is guilty of contempt of Court as alleged. But that is not the end of the matter because the orders of Majanja J have not been complied with. Although I was initially tempted to make certain orders in the interests of justice, the best order to make would be that the Parties should address me on that issue for appropriate direction and/or orders to be made after delivery of this Ruling.

33. In any event, the Application dated 10th April 2014 is dismissed. As for costs, let each Party bear its own costs.

34. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 11TH DAY OF SEPTEMBER, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Kazungu – Court clerk

Petitioner present

Miss Okimau for 1st Respondent

Mr. Thande for 2nd Respondent

Order

Ruling duly read.

ISAAC LENAOLA

JUDGE

Further Order

Mention on 17/9/2015

ISAAC LENAOLA

JUDGE

11/9/2015