



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
JUDICIAL REVIEW NO. 30 OF 2015
IN THE MATTER OF AN APPLICATION BY BEATRICE WAMBUI
MATHENGE, RAHMA ADAN JILLO AND GEORGE OTIENO OCHICH

AND

**IN THE MATTER OF CONTEMPT PROCEEDINGS AGAINST THE CABINET SECRETARY,
MINISTRY OF INDUSTRIALIZATION & ENTERPRISE DEVELOPMENT, THE PRINCIPAL
SECRETARY, MINISTRY OF INDUSTRIALIZATION & ENTERPRISE DEVELOPMENT AND
THE CHAIRMAN, CO-OPERATIVE TRIBUNAL**

AND

**IN THE MATTER OF SEC. 5 OF THE JUDICATURE ACT, CAP 8 LAWS OF KENYA,
PART 81.4 OF THE CIVIL PROCEDURE RULES OF ENGLAND**

BETWEEN

BEATRICE WAMBUI MATHENGE.....1ST APPLICANT

RAHMA ADAN JILLO.....2ND APPLICANT

GEORGE OTIENO OCHICH.....3RD APPLICANT

AND

**THE CS, MINISTRY OF INDUSTRIALIZATION &
ENTERPRISE DEVELOPMENT.....1ST RESPONDENT**

**THE PS, MINISTRY OF INDUSTRIALIZATION &
ENTERPRISE DEVELOPMENT.....2ND RESPONDENT**

THE CHAIRMAN, CO-OPERATIVE TRIBUNAL....3RD RESPONDENT

RULING

1. By an Application Notice dated 29th May, 2015, the ex parte applicants herein, **Beatrice Wambui Mathenge, Rahma Adan Jillo and George Otieno Ochich**, who are members of the Co-operative Tribunal (hereinafter referred to as “the Tribunal”) seek the following orders:

1. This application be certified as urgent and be heard ex parte in the first instance.

2. Directions for hearing of this application be issued.

3. An order for Committal for Contempt be issued against the Cabinet Secretary, Ministry of Industrialization and Enterprise Development, Mr. Adan Mahommed, Principal Secretary Ministry of Industrialization and Enterprise Development, Dr, Wilson Songa and The Chairman, Co-operative Tribunal, Mr. Mwangi Timothy Kariuki for a period of six (6) months or for such time as the court may determine for knowingly disobeying an order of this court issued on 17th March 2015.

2. The application was supported by an affidavit sworn by **Beatrice Wambui Mathenge** on 29th May, 2015.

3. According to the deponent, on 17th March 2015 this court issued an order in the following terms:-

a. The Co-operative Alliance of Kenya is hereby joined to these proceedings as an Interested Party.

b. The Respondents do file and serve Supplementary Affidavit within seven (7) days together with submissions;

c. The Applicants and the Respondents to serve the Interested Party with all the documents within seven (7) days;

d. The Interested Party do file and serve a replying affidavit documents within fourteen (14) days of service thereof;

e. Highlighting of the submissions be on 8th June 2015; and

f. In the meantime the operations of the Tribunal will continue as duly constituted.

4. Though the said order, it was deposed, was given in the presence and with the acquiescence of the advocates for the Applicants, Respondents and Interested Party, it was extracted and served upon the 1st and 2nd Respondents on 24th March 2015 and upon the 3rd Respondent on 20th March 2015. It was further deposed that on 12th May 2015 the order was served upon the 3rd Respondent in his office.

5. The deponent further deposed that by 16th April 2015 all the Respondents had complied with orders (b) and (c) of the order issued on 17th March 2015 and therefore the Respondents therefore had knowledge of the existence of the order. However, the Respondents have in defiance of the court order, excluded the Applicants from the sittings of the Tribunal at Meru between 23rd March, 2015 and 27th March 2015 and Kisumu between 20th April 2015 and 24th April 2015 notwithstanding that the Applicants were ready, able and willing to discharge their duties. The deponent added that between 18th May 2015 and 22nd May 2015 when the tribunal was scheduled to sit in Nyeri, the applicants notified the 3rd Respondent of their willingness to travel to Nyeri for the sittings in good time but did not receive any response. Further despite the deponent's request for the documents relating to the requisition of funds for the Tribunal's sittings in Kisumu and Nyeri no response was forthcoming.

6. She disclosed that between 18th May 2015 and 22nd May 2015 the Tribunal sat in Nyeri and matters could not proceed because of lack of quorum. As a result, litigants have had to suffer injustice because of the blatant defiance of the order of the court by the Respondents which led to denial of access to justice to

the litigants hence infringing on their constitutional rights. Apart from that the Respondents' blatant defiance of the court order has led to loss of public funds in the following ways:-

a. The deponent is a public official employed on a permanent basis and a full time member of the Tribunal and is paid through public funds. Her exclusion from the sittings means that she is still being paid from public funds notwithstanding that she has been prevented from discharging her functions.

b. Although funds were released for the tribunal sittings in Nyeri, no hearing was undertaken due to lack of quorum.

7. In the deponent's view, the Respondents deliberately defied the court order in the following manner:-

a. The 1st and 2nd Respondents authorized finances for the Tribunal sittings in Meru, Kisumu and Nyeri notwithstanding that the Applicants had been excluded from the sittings and the Tribunal did not carry its functions as duly constituted in terms of the order of the court.

b. The 1st and 2nd Respondents granted authority for use of a government vehicle for sittings in Meru, Kisumu and Nyeri notwithstanding that the Applicants had been excluded.

c. The 1st and 2nd Respondents refused and/or failed to ensure that the Tribunal carries out its functions in terms of the court order issued on 17th March 2015.

d. The 3rd Respondent requisitioned the funds to be used by the Tribunal in the sittings at Meru, Kisumu and Nyeri excluding the Applicants.

e. The 3rd Respondent as the presiding officer signed work tickets for use of government vehicles for the sittings in Meru, Kisumu and Nyeri notwithstanding that the Applicants had been excluded.

f. The 3rd Respondent presided over the Tribunal's sittings in Meru, Kisumu and Nyeri, and excluded the Applicants from participating in the sittings of the Tribunal.

8. To the deponent, since the 3rd Respondent is a judicial officer and is aware that court orders should be obeyed and has knowledge of the consequences of non-compliance with court orders, his failure to obey the court order is therefore out of impunity and failure to respect sanctity of the court. It was therefore necessary, she opined, that the orders prayed for in this application be allowed in order to protect the dignity of the court and uphold the Rule of Law.

9. In opposing the application, the 3rd Respondent, the Chairman of the Tribunal filed a replying affidavit sworn on 16th June, 2015.

10. According to him, the Tribunal is composed of seven (7) members including the Applicants herein six (6) of whom are part time members and attend tribunal sittings on different days of the week. Their sittings do not exceed (8) sittings per month per member. Thus the Applicants are not the only members of the tribunal and do not have a superior right to attend tribunal sittings to the exclusion of the other members.

11. According to him, as a Judicial Officer employed on permanent and pensionable terms by the judiciary he presides over the sittings of the tribunal on a full time basis from Monday to Friday and it is also part of his duties and responsibilities to organize and conduct sittings outside Nairobi. The Applicants on the other hand are part time members of the tribunal who usually attend sittings on Mondays and Tuesdays while the other three members who are based upcountry namely Eldoret, Kakamega and Bungoma attend tribunal sittings in Nairobi on Wednesdays and Thursdays.

12. He deposed that the 1st Applicant was recruited and offered employment by the Judicial Service Commission as Deputy Chairperson of the Tribunal but she declined the offer. She however did not relinquish the position of the Deputy Chairperson of the tribunal and as she has properly deposed in the verifying Affidavit sworn on 30th of January 2014 to the Applicants' main application dated 2nd February 2015, she is an employee of the Public Service Commission. Along with the 2nd and 3rd Applicants the 1st Applicant attends tribunal sittings part time mainly on Mondays, Tuesdays and sometimes on Wednesdays. She however sits on other days only when requested by the deponent to sit in for him.

13. The 3rd respondent however averred that no member of the tribunal other than himself attends tribunal sittings on Fridays which he reserved for mentions for directions, hearing applications for temporary injunctions, execution proceedings, delivery of judgements and rulings and any other matter that does not require the full hearing of a suit.

14. He deposed that with regard to the present application, he was away on leave from 25th of February 2015 to 19th of March 2015 but had to resume duty on 20th of March 2015 due to interruption of his leave by meetings called by the Chief Registrar of the Judiciary (CRJ) who asked him to attend personally as the head of the Co-operative Tribunal. During his absence the 1st Applicant was in charge of the affairs of the tribunal. Upon resuming duty on 20th March 2015 which was a Friday the 3rd Respondent deposed that he presided over the sittings of the tribunal alone and had to prepare to travel to Meru on 22nd of March 2015 to preside over the sittings there from 23rd of March 2015 to 27th March 2015. On the same day he resumed duty, he found on his desk an application for leave by the 1st Applicant which he signed and forwarded the same day to the 2nd Respondent for his approval.

15. According to him, upon his return from leave he never got any brief from the 1st Applicant regarding what had transpired during his absence but got a brief from the Secretary and Legal Officer of the tribunal who also headed the tribunal registry at the time regarding the goings on during my absence from which it was clear no cases were proceeding during his absence and there was a massive adjournment of cases by the 1st Applicant under the pretext that the deponent was on leave and the matters had to await his return for directions. He also personally went through the files and confirmed that was the position.

16. It was disclosed that since the 7th of April 2015 to 6th of May 2015 the 1st Applicant was on leave and she resumed sitting on 11th of May 2015.

17. The 3rd respondent deposed that with regard to the 2nd Applicant from 17th of March 2015 when the Order he is being accused of disobeying was issued to the time of filing of the present application she has only attended three (3) sittings in Nairobi and gave no explanation to the 3rd Defendant or the Secretary of the tribunal regarding her absence and that in itself is a sufficient ground for the 1st Respondent to remove her from the membership of the tribunal pursuant to the provisions of Section 77(4)(c) of the **Co-operative Societies Act** Cap.490.

18. With regard to the 3rd Applicant, the 3rd Respondent deposed, since the aforesaid order was issued to the time of filing of their present application he had only attended tribunal sittings nine (9) times in Nairobi. He disclosed that he has discovered that the 3rd Applicant joined the Advocates' Complaints Tribunal whose sittings he attends on the same days that he is supposed to attend the Co-operative Tribunal sittings. He further disclosed that as recently as 9th of June 2015 the three Applicants came to the tribunal in the morning and after they confirmed matters for hearing they started insisting that they had to leave to attend to their personal matters. At 11.30a.m. they walked out on the litigants and advocates who were waiting for their matters to be heard and the deponent was forced to proceed with the hearings alone and rose at about 3p.m.

19. It was therefore the 3rd Respondent's opinion that the aforesaid conduct of the Applicants clearly demonstrates they lack commitment to serve as members of the tribunal as they cannot choose which sittings to attend and which ones not to attend. By failing to consistently attend the sittings in Nairobi and

walking out on litigants and advocates while the tribunal is in session, the Applicants cannot come to this court to claim that they have been excluded from sittings of the tribunal.

20. It was disclosed that despite the Applicants' failure to attend the sittings of the tribunal as required the sittings of the tribunal have gone on without any interruption since the law (Section 80 (1) of the **Co-operative Societies Act**) has put safeguards to ensure that absenteeism by members wilfully or otherwise do not affect the operations of the tribunal. He further deposed that other than the false allegations that have been made by the Applicants, no member of the public, litigant or advocate has complained of being denied access to justice for the reason that the tribunal has failed to carry out its functions.

21. He deposed that as a Judicial Officer he knew from experience that court cause lists are not true reflections of what transpires in court during court sessions. Thus the cause list that the Applicants attached in their application are not proof or evidence of what transpired during the tribunal sessions held in Meru, Kisumu and Nyeri. They should therefore not mislead the court that matters were adjourned for lack of quorum. He reiterated that the 1st and 2nd Respondents had carried out the obligations to ensure that the tribunal operations continue as required under the law and in terms of the court order.

22. According to him, the Court Order did not compel the 1st and 2nd Respondents to approve funds for the operations of the tribunal only when the names of the Applicants were forwarded to them and therefore the Respondents are not in breach of the Court Order dated 17th of March, 2015.

23. In his view, as a Judicial Officer he cannot be sued in any court of law or punished for carrying out his judicial functions and the Applicants' application is to that extent incompetent and ought to be struck out as against the 3rd Respondent.

24. He deposed that the 1st Applicant's allegation that she is a permanent member of the tribunal and hence ought to be in all sittings of the tribunal is misleading as she only attends tribunal sittings on Mondays, Tuesdays and sometimes on Wednesdays. Apart from that Section 80(5) of the **Co-operative Societies Act** Cap.490 (hereinafter referred to as "the Act") provides what the role of the Deputy Chairperson of the Co-operative Tribunal is. Thus the 1st Applicant who is his deputy can only exercise his powers when he is unable to perform that power or function owing to illness or absence or when he authorizes her to exercise or perform those duties. To him, he has dutifully complied with that provision whenever he is unable to preside over the sittings of the tribunal. Further to the aforesaid provisions of the law, Section 80 (1) of the Act stipulates that for purposes of hearing and determining any cause or matter under the Act the Chairman and two members of the tribunal shall form a quorum. The proviso to Section 80(1) also allows the Chairman of the tribunal to sit alone and exercise the jurisdiction of the tribunal in the event of the absence of any member for any reason.

25. In his view, the order of the court issued on 17th of March 2015 was neither an order of prohibition restraining him from carrying out his judicial functions as per the law and the duties and responsibilities spelt out by the J.S.C. in its advertisement dated 25th November 2011 nor mandamus compelling him to include the Applicants in all circuit sittings of the tribunal. To the contrary, the aforesaid order of the court was directed to all parties to ensure that the operations of the tribunal continue as duly constituted. However, the Applicants' failure to attend tribunal sittings and their conduct of walking out of court on the litigants and advocates while they are waiting to be heard is a breach of the same order they are accusing the Respondents of disobeying and they cannot be heard to accuse the Respondents of excluding them from the sittings of the tribunal.

26. He disclosed that the sittings of the tribunal in Meru, Kisumu and Nyeri proceeded smoothly and not a single matter was adjourned for lack of quorum. Majority of the cases were settled by recording of consents, delivery of judgements and rulings and for those that were adjourned, the adjournments were caused by the Advocates for the parties or failure by the parties to attend.

27. The 3rd Respondent urged this Court in the exercise of its supervisory jurisdiction over the tribunal to call for all the files that the tribunal dealt with in Meru, Kisumu and Nyeri for purposes of perusing the

proceeding in order to be able to see that the Applicants are not misleading it but have sworn to falsehoods which they should be held accountable for.

28. He added that other than 22nd of March 2015 when he signed the work ticket for use of government vehicle to transport members and staff of the tribunal to Meru for the Meru tribunal sessions he never signed any other work ticket as alleged by the 1st Applicant and as such no public funds were wasted as alleged by the Applicants.

29. It was the 3rd Respondent's assertion that the Applicants have become vexatious litigants and instead of working as a team along with the other members of the tribunal and serving the public they have resorted to engaging the Respondents and courts in unnecessary litigation. He disclosed that while in the current matter the Applicants have sued the Respondents seeking among other orders an order of mandamus to compel the Respondents to undertake their statutory duties under the Act, the Applicants filed another case in the Employment and Labour Relations Court Nairobi and obtained interim orders against the Respondents and the Secretary of the Cooperative tribunal being cause **No.331 of 2015** claiming that the 1st Respondent who appointed them has no power to revoke their appointments and that it is only the J.S.C which can do so. He further averred that there are serious complaints that have been raised against the three Applicants by litigants and advocates regarding their conduct that are pending inquiry by the 1st Respondent and this application is only intended to delay the conclusion of this matter and that inquiry until their terms of office run out.

30. The deponent asserted that as an officer of this honourable court, he had not disobeyed and cannot disobey a court order. To the contrary, he had duly complied with the court order and continued to discharge his duties in accordance with the law and to ensure the tribunal discharges its functions and duties. As such the Applicants' application is devoid of any merit, is vindictive, malicious, full of falsehoods and an abuse of the court process. The same should be dismissed not only with costs but the Applicants ought to be held accountable for perjury.

Determinations

31. I have considered the application and the material on record.

32. 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 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.

33. 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**.

34. 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.

35. In my considered view, 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”.

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

37. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a Court of competent jurisdiction to obey it until that order was discharged, and disobedience of such an order would, as a general rule, result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt. A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid – whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed...If there is a misapprehension in the minds of the defendants as to the reasonable meaning of the order, then the expectation of them is that they would have made an application to the court for the resolution of any misunderstanding and this would have been the lawful course...In cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt...The inherent social limitations afflicting most people in a developing country such as Kenya have the tendency to restrict access to the modern

institutions of governance, and more particularly to the judiciary which is professionally run, on the basis of complex procedures and rules of law. Yet, this same Judiciary is generally viewed as the impartial purveyor of justice, and the guarantor of an even playing ground for all, a perception which ought to be strengthened, through genuine respect for the courts of justice, and through compliance with their orders. Consistent obedience to court orders is required, and parties should not take it upon themselves to decide on their own which court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice...Justice dictates even-handedness between the claims of parties; and if it the case that the plaintiff/applicant has not been accorded a level playing ground for the realisation of its economic activities, a matter that of course can only be established through evidence in the main suit, then the court ought to provide relief, by applying the established principles of law, one of these being the law of contempt...An *ex parte* order by the court is a valid order like any other and to obey orders of the court is to obey orders made both *ex parte* and *inter partes* since the Court by section 60 of the Constitution is the repository of unlimited first instance jurisdiction, and in this capacity it may make *ex parte* orders where, after a careful and impartial consideration, it is convinced that issuance of such an order is just and equitable. There is nothing potentially oppressive in an *ex parte* order, since such an order stands open to be set aside by simple application, before the very same court...Where a party considers an *ex parte* order to cause him undue hardship, simple application will create an opportunity for an appropriate variation to be effected thereto; and therefore there will be no excuse for a party to disobey a court order merely on the grounds that it had been made *ex parte* and this argument will not avail either the first or the second defendant”.

38. In Central Bank of Kenya & Another vs. Rital 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.

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

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

40. 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.”

41. 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.”

42. A Court order is binding on the party against whom it is addressed and until set aside remain valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must realise that once they are brought to court they are subject to the jurisdiction of the Court. Under Article 159(1) of the Constitution, Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under the Constitution. In exercising judicial authority the Courts and Tribunals are, inter alia, to be guided by the principle that the purpose and principles of the Constitution shall be protected and promoted. Under Article 10(1) of the Constitution the national values and principles of governance in the Article bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets the Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. Under clause (2)(a) of the same Article the national values and principles of governance include the rule of law. Musinga, J in **Moses P N Njoroge & Others vs. Reverend Musa Njuguna & Another Nakuru HCCC No. 247 “A” of 2004** was of the view, which view I respectfully associate myself with, that the rule of law requires that orders of the Court be respected and obeyed and that duty equally applies even where a party is dissatisfied with an order and has appealed to an appellate court against the order, ruling or judgement. Contemnors, the learned Judge held, undermine the authority and dignity of the Courts and must be dealt with firmly so that the Court’s authority is not brought into disrepute. The Judge was however of the view that that recourse ought not to be to a process of contempt in aid of a civil remedy where there is any other method of doing justice, and the jurisdiction of committing for contempt should be most jealously and carefully watched, and exercised with greatest reluctance and greatest anxiety on the part of the Judges to see whether there is no other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.

43. However, it must be noted that the contempt of court is an affront to judicial authority and therefore is not a remedy chosen by a party but is invoked to uphold the dignity of the court. The mere fact, therefore, that a party offended by disobedience of a Court order has floated his idea on what should be done to the contemnor, does not tie the court’s hands as to that mode of punishment although the Court may well take into account the suggested mode of punishment in appropriate cases.

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

45. It is trite law that where committal is sought for breach of an order, it must be made clear what the defendant is alleged to have done and that which is breached. The application must state exactly what the alleged contemnor has done or omitted to do which constitutes a contempt of court with sufficient particularity to enable him to meet the charge. The necessary information must be given in the notice itself. The slightest ambiguity in the order can invalidate an application for committal as ambiguity can in turn lead to the standard of proof, which is higher than the standard in civil cases but lower than criminal standard, not being attained especially on affidavit evidence. Therefore generally the law is that no order requiring a person to do or abstain from doing any act may be enforced by contempt unless a copy of the order has been served personally and endorsed with a notice informing him that if he disobeys the order he is liable to the process of execution. See **Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002, Victoria Pumps Ltd & Another vs. Kenya Ports Authority & 4 Others [2002] 1 KLR 708** and **Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.**

46. However, where it has been brought to the Court's attention that its orders are being abrogated or abridged by brazen or subtle schemes and manoeuvres in the name of technical procedures, the Court cannot turn a blind eye to the same. As was held in **Gatharia K. Mutitika & 2 Others vs. Baharini Farm Ltd. [1985] KLR 227:**

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

47. 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.”

48. 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.”

49. 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.”

50. 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.”

51. This Court on 17th March, 2015 directed that the operations of the Tribunal do continue as duly constituted. In giving the said directions, the Court expected the parties to this dispute to co-operate in order to ensure the smooth operations of the Tribunal. That expectation seems to have been reduced by the parties herein to mere wishful thinking. In my view where a Court makes orders or gives directions, the parties ought to take all necessary steps to comply therewith and where there is an ambiguity in the order, the only option is for the parties to come back to Court for clarification thereof. The parties have no discretion to interpret the order in such a way as to defeat the substance thereof.

52. In granting orders the subject of this application, this Court was aware that the 3rd Respondent is tasked with the overall leadership of the Tribunal and therefore may exercise the powers with respect to the composition of the panels. However the discretion must of necessity be exercised in accordance with the law and not arbitrarily, whimsically or capriciously but must be exercised judicially and judiciously. It is now trite that the Court is empowered to interfere even in the exercise of discretionary powers. The Court can only intervene in the following situations: (1) where there is an abuse of discretion; (2) where the decision-maker exercises discretion for an improper purpose; (3) where the decision-maker is in breach of the duty to act fairly; (4) where the decision-maker has failed to exercise statutory discretion reasonably; (5) where the decision-maker acts in a manner to frustrate the purpose of the Act donating the power; (6) where the decision-maker fetters the discretion given; (7) where the decision-maker fails to exercise discretion; (8) where the decision-maker is irrational and unreasonable. See the decision of **Nyamu, J** (as he then was) in **Republic vs. Minister for Home Affairs and Others ex Parte Sitamze Nairobi HCCC No. 1652 of 2004 (HCK) [2008] 2 EA 323.**

53. Therefore if in the exercise of his power to compose panels the 3rd Respondent acts in a manner geared towards the frustration or abuse of his powers, this Court would be obliged to step in and bring him back on track. As this Court has held time and again, public authorities are not entitled to abuse the discretion given to them since public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. Any public officer who therefore purports to exercise his power in a manner inimical to the spirit of Article 129 of the Constitution has absolutely no business holding a public office.

54. In this case, the applicants contend that the Respondents have undertaken their mandate in a selective and arbitrary manner by excluding them from performing their statutory mandate as members of the Tribunal. In my view, if the Respondents have done this, then it cannot be said that they have complied with the directions of this Court that the operations of the Tribunal do continue as duly constituted. Due constitution of the Tribunal and operations require that as long as the members continue to be such members, all of them ought to be treated equally and that the statutory duties conferred upon them by the Act be duly shared as contemplated under the Act.

55. It is however contended that the applicants by their conduct have made it difficult for the smooth operations of the Tribunal to be proceed. Again if the applicant's conduct is such that the Tribunal cannot by incorporating them in its operations serve the people as required under Article 129 of the Constitution, it would be imprudent to compel the Tribunal to empanel them in the sittings.

56. In this application there have been allegations and counter allegations made by various parties. These allegations are in my view quite serious. In fact a cursory perusal of the material on the file including the correspondences herein depict a very grim picture for the Tribunal.

57. Having considered the issues raised in the rivalling affidavits and taking into account the fact that in

cases of alleged contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but also proved to the standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. See **Gatharia K. Mutitika And Two Others vs. Baharini Farm Limited (1982-88) 1 KAR 863.**

58. Based on the cold-print affidavits filed herein I with respect am unable to find that the alleged contempt has been proved to the required particularity and standard.

59. In the premises I disallow the Application Notice dated 29th May, 2015 which application is hereby dismissed but with no order as to costs.

60. In order to protect the public who are the consumers of the services rendered by the Tribunal I direct that a copy of this ruling be served on the Secretary of the Judicial Service Commission and the 1st Respondent by the process servers of this Court to take the necessary steps to bring order and sanity to the operations of the Tribunal.

Dated at Nairobi this 5th October, 2015

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Anzala for the Applicants

Mr Odhiambo for the Respondents

Mr Ashitiva for the interested parties

Cc Patricia