



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MISC. APPLICATION JR NO. 596 OF 2008**

**IN THE MATTER OF APPLICATION FOR LEAVE TO FILE CONTEMPT PROCEEDINGS  
AGAINST THE COUNTY SECRETARY AND THE CHIEF LICENCING OFFICER OF  
NAIROBI CITY COUNTY**

**AND**

**IN THE MATTER OF AN APPLICATION BY KENYA UNION OF SAVINGS AND CREDIT  
COOPERATIVES (KUSCCO) LIMITED FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF LOCAL GOVERNMENT ACT CAP 265 (now repealed) AND  
SUCCEEDED BY THE COUNTY GOVERNMENTS ACT, 2013) CITY GOVERNMENT BY  
LAWS AND IN THE MATTER OF SINGLE BUSINESS PERMIT, AND THE COOPERATIVE  
SOCIETIES ACT CAP 490 OF 1997**

**BETWEEN**

**KENYA UNION OF SAVINGS AND CREDIT**

**COOPERATIVES (KUSCCO) LIMITED.....APPLICANT**

**AND**

**NAIROBI CITY COUNCIL (NOW**

**NAIROBI CITY COUNTY).....1<sup>ST</sup> RESPONDENT**

**THE COUNTY SECRETARY OF NAIROBI**

**CITY COUNTY.....2<sup>ND</sup> RESPONDENT**

**THE CHIEF LICENCING OFFICER**

**NAIROBI CITY COUNTY.....3<sup>RD</sup>  
RESPONDENT**

## RULING

### Introduction

1. By a Notice of Motion dated 3<sup>rd</sup> April, 2014, the ex parte applicant herein, **Kenya Union of Savings and Credit Co-operative (KUSCO) Ltd**, seeks the following orders:
  1. That this application be certified urgent deserving priority hearing.
  2. The contemnor, the County Secretary of Nairobi City County and the Chief Licensing officer or any other to be found to be the contemnor be and is hereby ordered to appear in court at the inter parties hearing of this application and they continue appearing until the determination of this application.
  3. That the contemnor the County Secretary of Nairobi City County and the Chief Licensing Officer or the Officer serving in equal capacity or the officer found to be the contemnor be cited for contempt for the willful disobedience of the order of this honourable court issued on 28<sup>th</sup> July 2009 approved by their counsel M/S Erick Abwao on 1<sup>st</sup> October 2009 and subsequently served upon the said counsel, following which the then acts complained of ceased
  4. That this honourable court be pleased to commit the aforesaid officers to civil jail for a period to be determined by this honourable court.
  5. That meanwhile, and of priority, the officers of the City County of Nairobi be directed once more to fully obey orders issued by this honourable court on 28<sup>th</sup> July 2009.
  6. Costs of this application to be provided for.

### The Applicant's Case

2. The application was based on the following grounds:
  1. That leave to institute contempt of court proceedings against the Respondents was duly granted by this honourable court.
  2. That by way of judicial review, this honourable court by an order of 28<sup>th</sup> July 2009 quashed orders requiring single business permit fee to be paid for the KUSCCO Members (Co-operatives) to Nairobi City Council on 28<sup>th</sup> July 2009.
  3. That in the same order the City Council of Nairobi as it was prohibited from demanding single business permit fee from KUSCCO and its members and indeed they ceased since then.
  4. That with the coming in force of the new constitution and the Nairobi City County replacing the City Council of Nairobi in running the functions of the City of Nairobi demands for single business permit fees started being made upon KUSCCO members.
  5. That upon advise of the existing orders, Nairobi City County officers ignored and persisted with the said demands and some members have paid while others are living under threats of being arraigned in court.
  6. That the orders are still in place and Nairobi City County is the successor of Nairobi City Council and ought to obey all existing orders binding the predecessor. However, the Nairobi City Government officers have refused and/or neglected to obey the said orders

**under the authority of the cited officers.**

3. The Application was supported by an affidavit sworn by **George Ototo**, the Applicant's Managing Director/Chief Executive Officer on 3<sup>rd</sup> April, 2014.
4. According to the deponent, following the ratification by the Minister for Local Government vide Legal Notice No. 5313 of the by-laws of the City Council of Nairobi (hereinafter referred to as "the Council") requiring Co-operatives to pay Single Business Permit (hereinafter referred to as "the Permit"), several members and officials the Applicant were arraigned in court and charged with failing to display or pay the said permits.
5. This prompted the filing of these proceedings in which the Court issued orders of certiorari and prohibition quashing the said permits. Accordingly the Minister advised the said Council, which is the predecessor of the Nairobi City County or any other Local Authority or successors in Kenya to refrain from demanding the said permits from the Applicant or any other savings and credit organisations (SACCOS) which were members of the Applicant.
6. It was deposed that the said order was made in the presence of and with the knowledge of the Council's advocate **Eric Abwao** who approved the same and was served on the said advocate by a process server. The Council, it was deposed, ceased from seeking payment for the permit until 2013 when its successor, Nairobi City County (hereinafter referred to as "the County") yet again began demanding and receiving payments for the purported permits from the Applicant's members prompting the said members in February, 2014 to seek directions thereon from the deponent with some of the members yielding to the said demands and paying for the same.
7. Since the Council's lawyers were aware of the orders, it was deposed that the Council was aware of the same as well as its successor, the County. However, the County on being presented with the order claimed the same had been quashed which was incorrect.
8. It was contended that the County through the 2<sup>nd</sup> and 3<sup>rd</sup> respondents being the principle authorising officers and other officers in the same capacity have chosen to disobey the court's order and proceeded to demand and receive payments in respect of the said permit from the Applicant's members hence this Application.
9. It was submitted that the Respondents' conduct defies authority and dignity of the court and interferes with administration of justice hence punishable by fine or imprisonment as was observed in **Africa Management Communication International Limited vs. Joseph Mathenge Mugo and Another [2013] eKLR**. Further support was sought from **Teachers Service Commission vs. KNUT & 2 Others [2013] eKLR** and **Basil Criticos vs. The Attorney General [2012] eKLR**.

### **Respondents' Case**

10. In response to the Application, the Respondents filed the following grounds of opposition:

**1. Nairobi City County, County Secretary, Nairobi City County and Chief Licensing officer, Nairobi City County (the alleged contemnors) were never party to proceedings in Nairobi HC JR No, 596 of 2008, as by dint of the provisions of Section 18 of the Sixth Schedule to the Constitution of Kenya as read together with the provisions of Section 134(1) of the County Governments Act No. 17 of 2012, the alleged contemnors only came into existence after 4<sup>th</sup> day of March 2013;**

**2. Nowhere in the application herein is it alleged and proved that the Applicant herein notified or brought to the attention of the Nairobi City County, County Secretary, Nairobi City County and Chief licensing Officer, Nairobi City County, the existence of a judgment and or order in Nairobi HC JR No. 596 of 2008, thus it is inconceivable how the alleged contemnors could disobey a court order whose existence they did not know of:**

**3. It is trite law as variously stated, including in cases of Gatonye Victor Kariuki & 2 Others versus John Guto & 2 Others, Milimani HCCC No. 336 of 201; and John Kenneth Mugambi versus City Council of Nairobi, Milimani HCCC No. 622 of 2008 that**

contempt proceedings, being quasi criminal in nature, cannot be vicariously imputed on third parties. A party alleging disobedience of a court order has the onus to strictly prove the criminal intent of the alleged contemnor, thus alleged actions of one Erick Abwao cannot be a basis to impute contempt on the part of Nairobi City County, County Secretary, Nairobi City County and Chief Licensing officer, Nairobi City County;

4. The so called Erick Abwao is neither an employee nor an agent of Nairobi City County, County Secretary, Nairobi City County and Chief Licensing Officer, Nairobi City County;

5. The judgment delivered and order issued in Nairobi HC JR No. 596 of 2008 was apparently so delivered and issued pursuant to the provisions of Trade Licensing Act (Cap 497) Laws of Kenya, whose Second Schedule exempted only professionals from payment of single Business Permits. Members of the Applicant were and still are not professionals capable of exemption from payment of single business permits as can be vividly discerned from the Circular No. 2401/TY/26 dated 28<sup>th</sup> September 2009 from the Ministry of Local Government to the Town Clerk, City Council of Nairobi which identified exempted professionals as only being:

- a. Architects and Quantity Surveyors;
- b. Pharmacists;
- c. Doctors & Dentists;
- d. Nurses;
- e. Surveyors;
- f. Veterinary Surgeons;
- g. Auctioneers;
- h. Engineers;
- i. Accountants;
- j. Estate Agents;
- k. Certified Public Secretaries; and
- l. Advocates

6. In any event, the Trade Licensing Act (Cap 497) Laws of Kenya pursuant to which judgment and order in Nairobi HC JR No. 596 of 2008 was apparently delivered and issued, was repealed by the Licensing Laws (Repeals and Amendment) Act No. 17 of 2006, at Section 112 thereof, thus is no longer part of Kenyan law, and therefore, the substratum of the judgment and order in Nairobi HC JR No. 596 of 2008 no longer exists as part of Kenyan law;

7. All laws, including judge made law delivered in Nairobi HC JR No. 596 of 2008 prior to the effective date of the Constitution of Kenya must be construed in consonance with the provisions of Section 7 of the Sixth Schedule to the Constitution of Kenya, which enjoins this honourable court to construe all law (including judgment in Nairobi HC JR No. 596 of 2008) that was in force immediately before the effective date of the Constitution with the alterations, adaptations, qualifications and exceptions necessary to

**bring it into conformity with the Constitution;**

**8. Paragraph 7 (b), part 2 of the Fourth Schedule to the Constitution of Kenya expressly mandates counties, including Nairobi City County to undertake “Trade Development and regulation, including – trade licenses (excluding regulating of professions),” thus members of the Applicant are by the Constitution of Kenya 2010 obliged to pay single business permits to Nairobi City County;**

**9. Trade licensing, including licensing of members of the Applicant, is a service function that Nairobi City County offers to, inter alia, the Applicant and for which under Articles 209(4) and 185(2) of the Constitution of Kenya, Nairobi City County is entitled to impose and recover, pursuant to the County legislation, payment of single business permits by the Applicant and its members;**

**10. Nairobi City County duly enacted and published the Nairobi City County Finance Act, 2013, which under the provisions of paragraph 2.6 thereof, entitles the County to impose and recover single business permits against, *inter alia*, SACCOs and Co-operative Societies, including the Applicant herein.**

**11. The application herein is grossly frivolous, misguided and an abuse of the court process.**

11. As the Respondents did not swear any affidavit to controvert the averments in the supporting affidavit I will ignore those averments which tend to dispute the factual averments sworn by the Applicant since factual depositions cannot be controverted by way of grounds of opposition and submissions from the bar.

12. It was submitted on behalf of the Respondent that the mandate of governance established by the people is defined by particular concepts, principles and values one of which is devolution and devolved units recognised and protected in Article 6 of the Constitution as a distinct and interdependent level of government from the national government. Under Article 176(1) organs of devolved government are the County Assembly and the County Executive. The Respondents relied on **Speaker of the Senate & Another vs. Speaker of the National Assembly & Others [2013] eKLR**. The Respondents also relied on **Nairobi Metropolitan PSV Saccos Union Limited & 25 Others vs. County of Nairobi Government & 3 Others, Nairobi CA No. 42 of 2014** in which the Court of Appeal affirmed the holding by **Lenaola, J** that:

**“Local authorities cannot be equated to County Governments as the structure and design of the Constitution has given County Governments an elevated position as one of the organs to which sovereignty of the people of Kenya is delegated under Article 1 of the Constitution.”**

13. It was submitted that by dint of the provisions of section 18 of the Sixth Schedule to the Constitution of Kenya as read with the provisions of section 134(1) of the **County Governments Act No. 17 of 2012**, the alleged contemnors only came into existence after 4th March, 2013 and they were not parties to the earlier proceedings herein. It was contended that there was no evidence that the said decision was brought to attention of the Respondents hence they cannot be accused of disobeying a Court order whose existence they did not know of. In support of this submission the Respondents relied on **John Kenneth Mugambi vs. City Council of Nairobi Milimani HCCC No. 622 of 2008** and added that because contempt proceedings are quasi criminal in nature, it must be proved by the applicant with such strictness of proof as is consistent with the gravity of the charge that the Court order was brought to the notice of the contemnor and the alleged contemnor aided or abetted the violation of the order and that an alleged contemnor cannot be liable for contempt in the absence of *mens rea* or *actus reus*.

14. It was further submitted that the guilt of contempt cannot be variously imputed on alleged contemnors based on actions or inactions of third parties and relied on **Gatonye Victor Kariuki & 2 Others vs. John Guto & 2 Others Milimani HCCC No. 336 of 2010**. Since the alleged **Eric Abwao** is neither an employee nor an agent of the County, the County Secretary and the

- Chief Licensing Officer of the County it was submitted his knowledge cannot be a basis to impute contempt on the part of the Respondents.
15. It was submitted based on **Republic vs. BPRT & 2 Others Nairobi HCJR No. 435 of 2012** and **Rozaah Akinyi Buyu vs. IEBC & 2 Others [2014] eKLR** that where a process is not served it renders the proceedings a nullity. Accordingly the Court was urged to set aside any order that may have been made against the Respondents concerning or in relation to the Court order herein for want of knowledge of the existence of the order.
  16. While rating the rounds of opposition hereinabove, it was submitted that trade licensing, including licensing of members of the Applicant, is a service function that the County offers to, inter alia, the Applicant and for which under Articles 209(4) and 185(2) of the Constitution of Kenya, the County is entitled to impose and recover, pursuant to legislation, payment of single business permits by the Applicant and its members. It was therefore submitted that the County enacted the ***Nairobi City County Finance Act, 2013*** which in paragraph 2.6 entitled the County to impose and recover single business permits against inter alia, SACCOs and Co-operative Societies including the Applicant herein.
  17. It was submitted that since the constitutionality of the said ***Nairobi City County Finance Act, 2013*** is not challenged this application ought to be dismissed with costs.

### **Determination**

18. According to ***Black's Law Dictionary***, 9<sup>th</sup> Edition at page 360:

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

19. In ***Halsbury's Laws of England***, 4<sup>th</sup> Edition Volume 9 at paragraph 52 it is stated:

**“It is a civil contempt of court to refuse or neglect to do an act required by a Judgment or order of the court within the time specified in the judgment or order...A judgment or order against a corporate body may be enforced by an order of committal against the directors or other officers of the corporation.”**

20. In **Hadkinson vs. Hadkinson (1952) 2 All ER 56**, the judges of the court of Appeal of England unanimously held that:

**“It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.”**

21. In ***The Law of Contempt***, Butterworths (1996) Pages 555 – 569 by Nigel Lowe and Brenda Sufrin it is stated that:

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

22. Court orders, it is my considered view, 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”.**

23. 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.

24. 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”.**

25. In **Central Bank of Kenya & Another vs. Ratilal Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. The consequences of failure to obey Court orders are that any action taken in breach of the court order is a nullity and of no effect.

26. 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.”**

27. A court order is binding on the party against whom it is addressed and until set aside remains valid and is to be complied with. I shudder to think of the place of our judicial system if parties are left to freely decide what court orders to obey and which ones to ignore. Parties must 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 thereunder bind all State organs, State officers, public officers and all persons whenever any of them (a) applies or interprets this Constitution; (b) enacts, applies or interprets any law; or (c) makes or implements public policy decisions. 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.

28. 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.

29. 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 to 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.**
30. 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.”**

31. 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.”**

32. 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.”**

33. 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.”**

34.As stated in *Halsbury’s Laws of England*, 4<sup>th</sup>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.”**

35.In this case although the Respondents contended that they were unaware of the order in question there was no affidavit in support of the said contention. In the absence of such an affidavit, the only factual evidence as to whether the Respondents were aware of the same is from the applicant.

36.Under Section 55 to 59 of the *Urban Areas and Cities Act* it is provided that:

*55. All rights, assets and liabilities accrued in respect of the properties vested in the local authorities established under the Local Government Act (Cap. 265) which shall stand repealed after the first election under the Constitution shall be dealt with as provided by law.*

*56. All directions, resolutions, orders and authorizations given by by-laws made, and licenses or permits issued by the local authorities established, under the Local Government Act and subsisting or valid immediately before the commencement of this Act shall be deemed to have been given, issued or made by the boards established pursuant to this Act, as the case may be, until their expiry, amendment or repeal.*

*57. (1) Every person who, immediately before the commencement of this Act was an officer, agent or member of staff appointed, seconded or otherwise employed by a local authority shall, on the commencement of this Act be seconded or otherwise deployed as may be provided by law.*

*58. (1) Any act, matter or thing lawfully done by any local authority before the commencement of this Act and any contract, arrangement, agreement, settlement, trust, bequest, transfer, division, distribution or succession affecting any service delivery, trade of any form, sale or dealings on land or any other matter affecting assets, liabilities or property belonging to any local authority whether moveable, immoveable or intellectual property shall, unless and until affected by the operation of this Act, continue in force and be vested in a body established by law.*

*59. Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.”*

37.This necessarily leads to a determination of who the “body established by law” is. **Okongo, J in J.A.S. Kumenda & Another vs. Clerk Municipal Council of Kisii & 6 others [2013] eKLR** held:

**“Due to the foregoing, it is clear that there are no transitional provisions in the County Governments Act dealing with actions and legal proceedings that were pending as at the date of the repeal of the Local Government Act. The reason for this obvious omission in drafting is not clear but I am of the opinion that it may be due to the fact that, an Act that was enacted earlier before the County Governments Act, namely, the Urban Areas and Cities Act, No. 13 of 2011 (“Urban Areas and Cities Act”) had transitional provisions dealing with rights and interests that had accrued prior to the repeal of the Local Government Act**

including pending actions and legal proceedings. Section 59 of the Urban Areas and Cities Act to which both parties herein referred to in their submissions although to support conflicting positions provides as follows; *“Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force, or any defence, appeal, or reference howsoever filed by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law”*. This section vests the power to proceed with and to defend actions and legal proceedings pending against the defunct local authorities upon *“a body established by law”*. This *“body”* is neither defined nor constituted under this Act. This section therefore attempts to provide a solution to the transitional question under consideration but one which is vague and not totally helpful.”

38. The learned Judge went on to say:

**“It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated. To hold as argued by the respondents herein that such legal proceedings should remain suspended until such a time that the said body is set up would result in an absurd and a manifestly unjust situation for the hundreds of litigants who have pending suits against the defunct local authorities. Such holding would also put courts in very awkward position as they would not know what to do with matters involving the defunct local authorities which are pending rulings and judgments before them. In conclusion, it is my finding that this application is sustainable and until the body referred to in section 59 of Urban Areas and Cities Act is set up or established, it shall be sustained against Kisii County Government which will also be bound by any orders that may be issued herein in place of the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the application.”**

39. It follows that since there is no credible averment that the Respondents were not aware of the order in question, I find that based on the factual averments by the Applicant, the Respondents’ predecessors were aware of the order in question and the same binds the respondents herein.

40. The next issue is whether in light of the current legal regime the Respondents are bound by the said order. The importance of the devolved system of governance was appreciated by the Supreme Court in Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR in which Mutunga, CJ expressed himself as follows:

**“The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state...”**

41. The learned President of the Supreme Court continued:

**“Given Kenya’s history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the “constitutional commitment to protect”; and it acknowledges an inherent need to assure sufficient resources for the devolved units... Article 96 of the Constitution represents**

the *raison d'être* of the Senate as “to protect” devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court’s inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities.....National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya’s social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act*.”

42. It ought to be appreciated that under the Constitution and the *County Governments Act*, there is an elaborate procedure for the enactment of county legislation with public participation playing a pivotal role therein which procedure was not available during the tenure of the local authorities as opposed to County Governments. As section 7(1) of the Transitional and Consequential Provisions of the Constitution of Kenya provides:

***All laws in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

43. Under Article 185 of the Constitution, the legislative authority of a county is vested in, and exercised by, its county assembly and the county assembly is empowered to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule.

44. It is contended that the County enacted the *Nairobi City County Finance Act, 2013* which in paragraph 2.6 entitled the County to impose and recover single business permits against *inter alia*, SACCOS and Co-operative Societies including the Applicant herein. This contention not challenged by the Applicant and in fact that seems to be the position from my perusal of the *Nairobi City County Finance Act, 2013* and as correctly submitted by the Respondents, the applicant have not challenged the said legislation.

45. It is contended that the *Trade Licensing Act (Cap 497) Laws of Kenya* pursuant to which judgment and order in Nairobi HC JR No. 596 of 2008 was apparently delivered and issued, was repealed by the *Licensing Laws (Repeals and Amendment) Act No. 17 of 2006*, at section 112 thereof, thus is no longer part of Kenyan law, and therefore, the substratum of the judgment and order in Nairobi HC JR No. 596 of 2008 no longer exists as part of Kenyan law. The said decision was delivered on 28<sup>th</sup> July, 2009. By that time the *Licensing Laws (Repeals and Amendment) Act No. 17 of 2006* had already been enacted. In fact the Court found that the *Trade Licensing Act (Cap 497) Laws of Kenya* had been repealed hence the Act was wrongly invoked. It was therefore clear that the Court’s decision was not grounded on the provisions of the said *Trade Licensing Act (Cap 497) Laws of Kenya* as alleged by the Respondents.

46. That notwithstanding, under the current constitutional dispensation, devolution is a key pillar in the values and principles of governance in Chapter 10 of the Constitution. In my view, all the pre-Constitution of Kenya, 2010 decisions must now, pursuant to section 7(1) of the Transitional and Consequential Provisions of the Constitution, be looked at in the light of the current constitutional

dispensation. This does not mean that all such decisions ought to be ignored but must be interpreted and construed in a manner that gives effect to the Constitution. Since the imposition of the Single Business Permit is pursuant to the said County Legislation which as of now has not been nullified, I hold that the decision given herein must be looked at in the light of the current devolution system of governance and since County Governments are empowered to enact legislation, where the Legislation enacted is inconsistent with the pre-2010 decisions and the said Legislation is not inconsistent with the Constitution, the pre-2010 decision cannot stand if its effect would be to contradict the legislation, it is no longer good law.

47. Accordingly, the order the subject of these proceedings must be construed in accordance with the current Constitutional dispensation and the prevailing legal regime and I find that in so far as the ***Nairobi City County Finance Act, 2013*** entitles the County to impose and recover single business permits against *inter alia*, SACCOs and Co-operative Societies including the Applicant herein, the Respondents are not in contempt of Court by collecting the said Single Business Permits from the applicant since their action is permitted by the law.

48. As was appreciated by the Judge in the said decision, the decision only applied to the Nairobi County and not to the other Counties in the Republic which may not have similar provisions.

49. This decision however ought not to be construed to mean that by imposing payment in respect of single business permits on SACCOs and Co-operative Societies, the ***Nairobi City County Finance Act, 2013*** cannot be challenged. That issue however is not before me and is beyond the scope of this discourse.

### **Order**

50. It follows that the Notice of Motion dated 3<sup>rd</sup> April, 2014 fails and is accordingly dismissed but with no order as to costs.

51. Those shall be the orders of the Court.

**Dated at Nairobi this 10<sup>th</sup> day November, 2015**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**Miss Said for the Respondent**

**Mr Okindo for Mrs Oloo for the Applicant**

**Cc Patricia**