



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

**MILIMANI LAW COURTS**

**MISCELLANEOUS APPLICATION NO. 88 OF 2014**

**PAUL MUTUA MUSAU**

**REGINA WANJIKU**

**DOMINIC MBINDA**

**FRANCIS WAMBUA**

**DANIEL NDEMO**

**JANE GACHERU**

**TITUS NZIOKI MUTUA.....APPLICANTS**

**-VERSUS-**

**THE SECRETARY**

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

**DIRECTOR OF ENVIRONMENT.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

**Introduction**

1. By a Notice of Motion dated the 20<sup>th</sup> of February, 2014, the Ex-Parte applicants herein seek the following orders:

**1. That the matter be certified urgent and be heard *Ex parte* at the first instance**

**2. That the honourable court be pleased to set down the matter for inter parte hearing be set on a priority basis.**

**3. That the honourable court be pleased to issue an order of committal to civil jail against the defendants namely Dr. Leah Oyake-Ombis and Lilian Ndegwa being the agents of the defendant/Respondents herein, for such period of time as this honourable court may deem fit.**

4. That in the alternative the honourable court do order for the attachment of the defendants property to compensate the plaintiffs for loss occasioned by the defendants actions to evict them from their trading points at the recreational centres of Uhuru Park and Central Park.
5. That the court issue an order that the plaintiff/applicant to continue carrying on business at the Uhuru park without licences pending the hearing and determination of the application and the JR Case No. 22 of 2014.
6. That the Honourable court do order for a stay of criminal proceedings in criminal case Nos. M.1802/2014, M.1803/2014 and M. 1891/14 at the City Court against the servants of the Plaintiff herein
7. That the Defendants be condemned to meet the costs of this application.

### Ex-Parte Applicants' Case

2. In support of the application, the applicants filed a supporting affidavit sworn by **Paul Mutua Musau**, who was wrongly described in these proceedings as the 1<sup>st</sup> Plaintiff on 20<sup>th</sup> February, 2014.
3. According to the deponent, this Honourable Court granted leave on 23<sup>rd</sup> January 2014 which leave operated as a stay of the outcome of the ballot exercise conducted on 15<sup>th</sup> January, 2014 to evict the applicants from their trading points at the Uhuru Park and Central Park grounds which order was served upon the 1<sup>st</sup> and the 2<sup>nd</sup> Defendant/Respondents on the 24<sup>th</sup> January 2014.
4. Subsequently on 5<sup>th</sup> February 2014 the matter came up for hearing and while the defendant advocates were not ready for the hearing the applicants' advocates alerted the court of the impending harassment and ultimate eviction and the court directed the Defendant's advocates to advise their clients. However two hours after the said proceedings, the county government police pounced on the Defendant's (sic) and arrested the Plaintiffs (sic) servants and employees and arrested them confiscating their items of trade and caused them to be charged in the city court vide Criminal case Number M.1802 and M. 1803. Despite attempts by the advocates to have the matter resolved, such attempts were unsuccessful. As if that was not bad enough, it was deposed that the following day on 6<sup>th</sup> February 2014 the defendants again caused the County Government Police Officers to pounce on the plaintiff's trading point and confiscated their trading items and equipment and arrested their selling agents.
5. According to the deponent, the defendants have circumvented and disobeyed the orders of the court and went ahead to allow the winners of the unlawful ballots exercise the subject matter in **Judicial Review Case No. 22/2014** by issuing them with trading licenses whilst denying the plaintiffs herein the same.
6. The deponent further disclosed that prior to filing of this application, the applicants' advocates on record served the Hon. Attorney General with a Notice of Application for Leave and the applicants obtained the leave of the court to institute these proceedings against the defendants.
7. It was contended that the Defendants have fragrantly disobeyed the entire order and have refused, neglected and/or otherwise failed to comply with the same and as a consequence thereof, the authority and dignity of this Honourable Court has been, and continues to be exposed to ridicule and disrepute. The applicants averred that it is in the interest of justice and for the purposes of upholding the dignity and Honour of this Honourable court that the orders sought herein ought to be granted since the Defendants are in wilful and blatant contempt of a court order and the applicants have no other means of enforcing the order.
8. Apart from that affidavit there were other affidavits sworn by the said deponent on 27<sup>th</sup> March, 2014 and 30<sup>th</sup> May, 2014 which the Court has considered and which in the Court's view do not elevate the application any further.

### Respondents' Case

9. In response to the application the Respondents filed a replying affidavit sworn by **Dr Leah OyakeOmbis**, the 2<sup>nd</sup> Respondent and the Director of Environment of the Nairobi City Council on 14<sup>th</sup> March, 2014.
10. According to the deponent, the issuance of trading licenses to traders within the jurisdiction of Nairobi City County and all aspects relating to licensing are matters handled by the County's licensing department which is wholly independent of the Environment Department of which he is a Director.
11. According to him, the trading activities in issue are intended to take place at Uhuru Park and Central Park and before the licensing department may issue trading licenses for the carrying on of business at those locations or at any other park, it will liaise with and seek clearance of the environment department for purposes of safeguarding environmental concerns. In his view, prior to the balloting exercise that is subject matter of the instant case, no trader had been issued with a year 2014 license to trade at the aforesaid parks and the purpose of the exercise was to pick out a manageable number of traders out of numerous interested persons to be considered for issuance of year 2014 licenses hence it cannot be true that the Applicants were evicted from the suit places as alleged in their Application.
12. It was further deposed that the balloting exercise that had been contemplated earlier to pick such traders was with the concurrence of all interested traders was abandoned because due to the very high number of persons who turned up as it would have turned out to be laborious, long and cumbersome. Accordingly, balloting was preferred as a quick, fair and expeditious way to process the matter of which all parties agreed to and participated. The said balloting was undertaken on 15<sup>th</sup> January 2014 and it was open to all interested traders including the instant Applicants at the end of which the successful traders were picked out and on 16<sup>th</sup> January 2014 his department prepared clearance certificates in their names which were on the same day forwarded to the licensing department and the latter issued licenses to the said traders immediately.
13. It was the deponent's view that once the department of environment transmitted the names of successful ballottees to the department of licensing for purposes of issuing licenses, it became functus officio in the matter.
14. He further deposed that he had noted from the pleadings filed by the Applicants that the order subject matter of this suit was made on 21<sup>st</sup> January 2014 although licences of the successful ballottees had been issued on 16<sup>th</sup> January 2014. However, the foregoing notwithstanding the order made on 21<sup>st</sup> January 2014 by the honourable court in this matter was at all material times never served on him and he saw the said order for the first time when the Applicants' Notice of Motion dated 20<sup>th</sup> February 2014 was shown to him.
15. Although it was alleged by the Applicants' process server in an Affidavit of service sworn on 28<sup>th</sup> January 2014 that he effected service of the order in the deponent's office on the same date upon medium aged women, he found it unusual that the process server made no attempt to serve him personally since he was in the office most of the day on 24<sup>th</sup> January 2014 and none of his staff drew his attention to the alleged order on that day or even subsequently.
16. The deponent averred that he was a law abiding citizen and have always obeyed all court orders whenever they are brought to his attention hence it would be unfair and unjust to punish him for alleged contempt of the order in issue in the manner proposed by the Applicants or at all.
17. Based on advice from his advocates, he deposed that the law on contempt of court orders is settled to the effect that no alleged contemnor will be found to be in contempt unless personal service of the order in issue together with a Penal Notice have been established and there has been wilful disobedience of the order.
18. With respect to the prayer by the applicants to be allowed to continue carrying on business at Uhuru Park without licenses pending determination of their Application, the deponent reiterated that before the impugned balloting was undertaken, no trader was carrying on business at Uhuru Park and indeed, none had been licensed to do so in the year 2014. Further, the Applicants herein freely participated in balloting and were unsuccessful and have only come to court after losing out at balloting. To him, this kind of background cannot justify their being allowed to carry on business without licenses. Additionally, allowing the Applicants to carry on their businesses without licenses as prayed will conflict with applicable statutory and county laws and manifest discrimination against those county traders who have paid for and taken out licenses for the year

- 2014 and will create anarchy on the ground because the successful ballottees are already trading and allowing additional traders will compromise environmental concerns.
19. The deponent further disclosed that the said prayer is also pending determination in the Applicants' Judicial Review number 22 of 2014.
  20. It was therefore his view that the Applicants have also not made out a case for stay of criminal cases stated on the face of their Notice of Motion and that a court dealing with an Application for alleged contempt of court is not the right forum to deal with prayers 5 and 6 of the Applicant's Notice of Motion. In his view, the charges brought against the accused were not motivated by malice, harassment, or improper considerations but were informed with a genuine concern that the traders were in contravention of statutory and county laws which required them to acquire licenses before carrying on their businesses.
  21. There was also a replying affidavit **Lilian Ndegwa**, the 1<sup>st</sup> Respondent herein on 14<sup>th</sup> March, 2014.
  22. According to her, contrary to the allegations made by the Applicants, she has at no time disobeyed the order of this Honourable Court made on 21<sup>st</sup> January 2014 either directly or through any agency and that indeed the said order was at all material times never served on her and that she first got to know about the suit order when she was shown the Applicants' Notice of Motion herein dated 20<sup>th</sup> February 2014.
  23. To her, the Applicants' process server conceded in his Affidavit of service sworn on 28<sup>th</sup> January 2014 that he was never instructed to serve the said order on the deponent and he never did. Further, the deponent was informed by the Respondents' Advocates on record which information she verily believe to be true that they confirmed from the Process Servers Committee that **Patrick Kieti Kimaile** is not a licensed Court Process Server and lacks the requisite authority to serve court documents on any party.
  24. The deponent averred that she was a law abiding citizen and had always obeyed all court orders whenever they were brought to her attention. Based on information furnished by the Respondents' advocates she averred that for contempt of court proceedings to succeed, the Applicant must show that the alleged contemnor has previously been served with the order in issue together with a penal notice on that behalf and he has wilfully disobeyed the same which the Applicants failed to do so in this case.

### **Determination**

25. I have considered the issues raised hereinabove and this is the view I form of the matter.
26. In contempt of Court matters, 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 which 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.***
27. As this Court has held before, it is unfortunate and regrettable that in this age and era, our procedure, with respect to punishment for contempt in our Court is referable to the procedure in the High Court of Justice in England.
28. 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**.
29. 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 1<sup>st</sup> 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.

30. In this case the application was clearly not properly made as the "application notice" ought to have been made in the proceedings in which the judgement or order was made
31. That said and done, Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. 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".**

32. 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.**
33. In **Wildlife Lodges Ltd vs. County Council of Narok and Another [2005] 2 EA 344 (HCK)** the Court expressed itself thus:

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

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

34. The conditions necessary for an order of committal for contempt are now well established. 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 it is breached. The notice of motion 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 the criminal standard, not being attained especially on affidavit evidence. Therefore 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. In other words the Court will only punish for contempt of an order if satisfied that the terms of the order are clear and unambiguous and that the defendant has a proper notice of the terms and the breach of the order has been proved beyond reasonable doubt. See Republic vs. Commissioner of Lands & 12 Others Ex Parte James Kiniya Gachira Alias James Kiniya Gachiri Nairobi HCMA No 149 of 2002 and Jacob Zedekiah Ochino & Another vs. George Aura Okombo & 4 Others Civil Appeal No. 36 of 1989 [1989] KLR 165.
35. In this case whereas the applicants contend that the Respondents were duly served with the order, the Respondents’ position is that the order was not served. This Court must however make it clear that the purpose of personal service is to bring to the attention of the person concerned that a Court order has been issued which requires to be complied with. This is necessary as committal proceedings are quasi criminal in nature and the person cited is in danger of being deprived of his or her liberty. However, in my view there is no magic in personal service. Once it is clear beyond peradventure that the person cited was aware of the Court order, it would be elevating procedural rules to a fetish to insist that despite such an awareness, the person would still be free to disobey the order in question with impunity. Such a course in my view ought not to be countenanced by any Court since contempt proceedings are not proceedings between the parties but are meant to uphold the dignity of the Court and to express the Court’s displeasure at the conduct of the person cited in failing to comply with the orders of the Court. Such conduct is punishable in order to uphold the rule of law and to avoid anarchy. As aptly defined in *Black’s Law Dictionary*, 9<sup>th</sup> Edn. contempt

is a conduct which defies the authority or dignity of a court and because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment. It is my view however that contempt of Court is a violation of the principle of the rule of law and the courts are entitled in appropriate circumstances to find that a person who disobeys court orders is guilty of violation of the national values and principles of governance in Article 10 of the Constitution.

36. I further associate myself with the decision of **Mabeya, J** in **Africa Management Communication International Limited vs. Joseph Mathenge Mugo & Another [2013] ECLR** in which he expressed himself as follows:

**“As early as 1778, Chief Justice McKean of the United States, when dealing with a case of a party in Civil litigation who refused to answer interrogatories is noted to have stated:-**

**“Since however, the question seems to resolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case.” (The History of contempt of Court (1927) P 47).**

**In Johnson Vs Grant (1923) SC 789 at 790 Clyde L J noted:-**

**“The phrase ‘contempt of court’ does not in the least describe the true nature of the class of offence with which we are here concerned... The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice..... it is not the dignity of court which is offended – a petty and misleading view of the issues involved, it is the fundamental supremacy of the law which is challenged.” (Emphasis mine).**

**Closer home, in the case of TEACHERS SERVICE COMMISSION v KENYA NATIONAL UNION OF TEACHERS & 2 others [2013] eCLR Ndolo J observed that:-**

**“38. The reason why courts will punish for contempt of court then 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 proceedings. It is about preserving and safeguarding the rule of law.”**

**I am of the same persuasion. The reason why power is vested in courts to punish for contempt of court is but to safeguard the rule of law which is fundamental in the administration of justice. The law of contempt has evolved over time in order to maintain the supremacy of the law and the respect for law and order. As it was in the time of Chief Justice McKean in 1778, so it is today that courts have a duty to ensure that citizens bend to the law and not vice versa. Indeed, if respect for law and order never existed, life in society would be but short, brutish and nasty. It is the supremacy of the law and the ultimate administration of justice that is usually under challenge when contempt of court is committed. This is so because, a party who obtains an order from Court must be certain that the order will be obeyed by those to whom it is directed. As such, the obedience of a court order is fundamental to the administration of justice and rule of law. A court order once issued binds all and sundry, the mighty and the lowly equally without exception. An order is meant to be obeyed and not otherwise.**

**I am guided by the holding of Lenaola J in the case of Basil Criticos Vs Attorney General and 8 Others [2012] eCLR where he stated that :-**

**“...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order, the strict requirement that personal service must be proved is rendered unnecessary”**

37. It follows that the issue whether or not service was effected by a person who was not a duly appointed process server is neither here nor there. After all Order 5 rule 5(3) of the **Civil Procedure Rules** provides:

***No objection may be made to the service of a summons on the grounds that the person who served the summons either was not authorized so to do or that he exceeded or failed to comply with his authority in any way.***

38. According to the affidavit of service sworn by **Patrick Kieti Kimaile** on 28<sup>th</sup> January, 2014 he proceeded to City Hall to effect service upon the 2<sup>nd</sup> Respondent and Director Legal Nairobi City County which are located in 3<sup>rd</sup> Floor Room 317 and 12<sup>th</sup> Floor City Hall Annex. Upon arrival he found medium aged women who acknowledged service by signing and stamping the documents in question. He exhibited copies of the served documents which bore signatures and stamps from the said department. However, the stamp by **Abwao Erick** showed the date as 24<sup>th</sup> January, 2013 while that of the Department of Environment indicated 24<sup>th</sup> January, 2014 as the date of receipt. It is therefore not possible to understand how the said order was received on 24<sup>th</sup> January, 2014 even assuming that the year was mistakenly indicated taking into account that this was just at the beginning of the year, yet the process server deposed on oath that service was effected on 28<sup>th</sup> January, 2014.

39. As was appreciated by **Mabeya, J** in (supra)

**“The standard of proof in matters of contempt of court is well settled. It must be higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt. See the case of *Mutitika vs Baharini Farm Limited* [1985] KLR 229. This is because the charge of contempt of court is akin to a criminal offence. A party may lose his liberty.”**

40. I am therefore not satisfied that based on the affidavit of service one can conclusively find that the order was duly served on the Respondents in order for this Court to find them to be in contempt of Court.

41. It is however contended that on 5<sup>th</sup> February, 2014 when the matter came up for hearing the Respondents' advocate sought for time and the applicants' advocates expressed the applicants' fears that the Respondents were intending to demolish their structures. Despite the Court's sentiments, two hours later the County Government Police arrested the applicants and confiscated their items of trade and caused them to be charged in City Court. Unfortunately, due to the mode of institution of these proceedings, the applicants' position cannot be verified. Had these proceedings been instituted in the same proceedings in which the orders alleged to have been disobeyed were given it would have been easier for the Court to verify the same. It must now be clear to the applicants why the procedure requires that the application for contempt be made in the same proceedings in which the order alleged to have been disobeyed was given. I am therefore unable to make a determination on that allegation.

42. That however is not the end of the matter. In **Central Bank of Kenya & Another vs. Ratalil Automobiles Limited & Others Civil Application No. Nai. 247 of 2006**, the Court of Appeal held that Judicial power in Kenya vests in the Courts and other tribunals established under the Constitution and that it is a fundamental tenet of the rule of law that court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or to ignore such orders as directed to him or them by a Court of law. 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.

43. Where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance of actions taken in breach of a Court order must therefore break-down once the superstructure upon which it is based is removed since you cannot put something on nothing and expect it to stay there as it will collapse. See **Macfoy vs. United Africa Co. Ltd [1961] 2 ALL ER 1169 at 1172 & Omega Enterprises (Kenya) Ltd. vs. KTDC & 2 Others Civil Appeal No. 59 of 1993**.

44. Although I do not have satisfactory evidence upon which I can cite the Respondents and punish them for contempt, that does not mean that the orders given by the Court have been rendered worthless. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013:**

**“In my view it does not matter that the person alleged to have acted in contempt of court was unaware of the existence of the order. Whereas he may not be committed for contempt of a court order which he was not aware of, his unawareness does not sanitise the illegal action which would still be null and void.”**

45. Therefore whereas the Respondents may not be committed to jail for disobeying the orders issued in this matter, 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 non-compliance with technicalities of procedures this Court cannot turn a blind eye to the same. Fundamental rights and freedom which are expressly laid out in our Constitution must never be given casual observance or breached with impunity by the Government or its servants. If we show disrespect to the supreme law of the land and fail to punish or penalise those who violate important provisions we will be encouraging such violation. As was held by **Warsame, J** (as he then was) in **Mohamed Aktar Kana vs. Attorney General Nairobi HCCP No. 544 of 2010:**

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

46. As the Notice of Motion dated the 20<sup>th</sup> of February, 2014 does not meet the threshold for committal for contempt of Court the same is dismissed but in the circumstances of this case, there will be no order as to costs.

**Dated at Nairobi this 5<sup>th</sup> day of November, 2014**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

***Mr Mwenesi for Mr Omoti for the 1<sup>st</sup> Respondent***

***Mr Ndungu for Mr Odiya for the Applicant***

***Cc Patricia***