



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**JUDICIAL REVIEW NO. 4 OF 2019**

**PAUL GATHINGU GACHIE.....EX-PARTE APPLICANT**

**VERSUS**

**CABINET SECRETARY FOR LANDS AND**

**PHYSICAL PLANNING.....RESPONDENT**

**RULING**

**[NOTICE OF MOTION DATED AND FILED ON THE 6<sup>TH</sup> FEBRUARY, 2020]**

1. The Ex-parte Applicant filed the Motion dated and filed on the 6<sup>th</sup> February, 2020, seeking for the Cabinet Secretary, Ministry of Lands and Physical Planning, **Hon. Farida Karoney**, and the Director, Land Administration, Ministry of Lands and Physical Planning, **Mr. Edward K. Kosgei**, the Contemnors, to be found to be in contempt of Court for disobeying the orders of 26<sup>th</sup> July, 2019 and be detained in prison or any other rehabilitation facility for two (2) years and pay a fine of Kshs.20,000,000 each. The Ex-parte Applicant also prays for costs. The application is based on the eleven (11) grounds marked (a) to (k) on its face and supported by the affidavits sworn by **Paul Githungu Gachie** on the 6<sup>th</sup> February 2020, 4<sup>th</sup> March 2020 and 2<sup>nd</sup> April, 2020. The Exparte Applicant's case is as follows;

- That his application for leave to commence judicial review proceedings dated the 25<sup>th</sup> July, 2019 was granted on 26<sup>th</sup> July, 2019 in **Eldoret ELC Misc. Application No. 27 of 2019**. That the Court also directed that the leave granted should operate as stay of the decision contained in or action taken pursuant to Legal Notice No. 106 contained in Kenya Gazette Supplement No. 101 of 1<sup>st</sup> July, 2019.
- That the order was extracted and saved together with the application upon the Respondent on 29<sup>th</sup> July, 2019 and affidavit of service filed.
- That contrary to the stay order, Edward Kosgei, Director Land Administration issued notices on 22<sup>nd</sup> January, 2020 conveying the Cabinet Secretary's instructions that the Department of Land Administration was to proceed to implement Legal Notice No. 106 of 14<sup>th</sup> June, 2019. That by issuing the said instructions, the Hon. Farida Karoney, the Cabinet Secretary, Ministry of Lands and Physical Planning has equally breached the terms of the order.
- That the said Edward K. Kosgei has purported to sign leases over private land on 30<sup>th</sup> January, 2020 and 24<sup>th</sup> February, 2020 as confirmed from the attached copies.
- That service of the order and application to the Respondent through its Legal Department which ordinarily receive service of legal documents, and which service was duly acknowledged, was procedural and good service.
- That attempts by the process server to serve Hon. Farida Karoney, the Cabinet Secretary personally were unsuccessful as her Secretary had informed the process server that all court documents were to be served upon the Legal Department.
- That the Contemnors were obligated to obey the Court order notwithstanding, the Hon. The Attorney General's advisory that was misleading, as the substantive Motion had been filed and served upon the Respondent through the Legal department on 4<sup>th</sup> September, 2019.
- That the order of 26<sup>th</sup> July, 2019 served upon the Respondent on the 29<sup>th</sup> July, 2019 did not indicate that it was to lapse at the expiry of 21 days, as the stay was to be in force until the determination of the substantive application.

- That Edward Kosgei has continued to sign the leases contrary to the order even after the service of the contempt application on the 7<sup>th</sup> February, 2020 through which the order was brought to his attention.

- That the Contemnors claim that they committed the violations unknowingly and cannot undo what had already been done should not be accepted, as they have continued to disobey the order instead of purging their contempt by stopping further violations.

2. The application is opposed by Hon. Farida Karoney, the Cabinet Secretary, Ministry of Lands and Physical Planning, and Edward K. Kosgei, Director Land Administration at the said Ministry, through their replying affidavits dated the 24<sup>th</sup> February, 2020 and 21<sup>st</sup> February, 2020 respectively, and both filed on the 5<sup>th</sup> March, 2020. That it is their case that;

- The application is incurably defective, incompetent and offends the mandatory provisions of the **Judicature Act Chapter 8 of Laws of Kenya**, and **Order 52 Rule 2 of the Rules of the Supreme Court of England**.

- That the Contemnors were not personally served with the pleadings, order of 26<sup>th</sup> July, 2019 and the current application as the affidavits of service shows the service was effected on other departments.

- That the Cabinet Secretary learnt of the order of 26<sup>th</sup> July, 2019 on 4<sup>th</sup> December, 2019 through the Media and contacted the Hon. Attorney General for advisory opinion. That the Hon. Attorney General reviewed the pleadings in **Eldoret ELC Misc. Application No. 27 of 2019** and discovered the substantive Motion had not been filed before rendering their opinion.

- That the Exparte Applicant was required to file the substantive application in 21 days in **ELC Misc. Application No. 27 of 2019**, and on finding none after the lapse of 21 days, the Attorney General advised that the stay order of 26<sup>th</sup> July, 2019 had lapsed.

- That following the advisory, the Cabinet Secretary proceeded to effect measures to implement the legal notice absolutely in good faith and based on the sound advisory by the Principal Legal Advisor of the Government.

- That the Contemnors learnt on 10<sup>th</sup> February, 2020 that the contempt application in **Eldoret ELC Judicial Review No. 4 of 2019** had been served upon the Ministry. That upon contacting the Attorney General, they confirmed that indeed, the application had been filed. That the Respondents were not aware of **Eldoret ELC Judicial Review No. 4 of 2019** having been commenced before then, as the known practice is to have the substantive Motion filed in the file where the leave was obtained to avoid duplication, wastage of public resources, and for ease of tracking of the files.

- That following the advisory opinion of the Attorney General, the Cabinet Secretary advised the Director Administration to implement the legal notice. That consequently, the personal stamps for the officers in the impugned legal notice were prepared, and issued. That the officers have since 22<sup>nd</sup> January, 2020 been signing the leases and licences, hence conferring interests to bona fide members of the public.

- That it is impossible to undo any of the transactions and the interests already registered following the implementation of the impugned legal notice, as the Ministry have no control on what members of the public do with their titles once issued. That this is an exceptional case and the Court should consider the wider public interest and vacate the orders, to ensure the security of the land rights and so as to enhance cost effective administration of land in the country.

- That the application is bad in law as no leave to commence contempt proceeding was ever obtained; no leave to enjoin the Cabinet Secretary in the proceedings was sought; no statement of facts was filed, and the contempt application was not served upon the Attorney General as required.

3. The learned Counsel for the Exparte Applicant and the Respondents filed the written submissions dated 2<sup>nd</sup> April, 2020 and 16<sup>th</sup> July, 2020 respectively.

#### **A. APPLICANT'S SUBMISSIONS**

##### **SUMMARY**

- The learned Counsel opened their submissions with a citation of the Court decision in **Republic Vs Kenya School of Law & 2 Others Exparte Juliet Wanjiru & 5 Others [2015] eKLR**, where the Court among others stated that where a party is for some reason unable to properly understand the court order, one ought to come back to court for interpretation or clarification. It is their submissions that the order of 26<sup>th</sup> July, 2019 was extracted and served upon the Respondents on the 29<sup>th</sup> July, 2019 through the Ministry's legal department, which is ordinarily mandated with receiving such documents on behalf of the Respondents. That despite the service of the order which is still varied, the Respondent went ahead and directed the implementation of the impugned legal notices.

- That **Sections 29 of the Environment and Land Court Act, Sections 63(1) 3, and 3A of the Civil Procedures Act, Order 40 of the Civil Procedure Rules, Order 52 Rule 2(2) of the Rules of the Supreme Court of England 1965, The Contempt of Court Act 1981 & Part 8 Civil Procedure (Amendment No. 2) Rules, 2012, Laws of England**, as amended from time to time provides the substantive and procedural law for instituting contempt proceedings and the Applicant has complied with them in this application.

- The learned Counsel referred to the case of **Ramadhan Salim Vs Evans M. Maabi t/a Murby Auctioneers & Another, Civil Appeal No. 69 of 2015**, where the Court stated among others that when an injunction is issued under **Order 40 of the Civil Procedure Rules**, it is the Court that issued the order that is competent to hear an application of contempt when there is a disobedience of the order. The Counsel also referred to the case of **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**, in which the Court of Appeal affirmed **Section 5 of the Judicature Act**, and **Section 63(c) of the Civil Procedure Act** as the statutory basis of contempt of court in so far as the court is concerned. That the court further interpreted **Section 5 of the Judicature Act** and held that the law in contempt of Court proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt is made. That leave or permission was not required where the committal proceedings relates to breach of judgment, order or undertaking, but in other applications. That the applicant herein did not need to seek for leave before filing the contempt proceedings. The Counsel further referred to the case of **Econet Wireless Kenya Ltd Vs Minister for Information and Communication of Kenya & Another Misc. application No. 1640 of 2003, [2005] eKLR** and **Arthur Nderitu & Another Vs Settlement Fund Trustees & 2 Others; Fredrick Wang'ombe Nderitu & Another (Proposed Interested Parties) [2019] eKLR**.
- That though the contemnors were served with the order of 26<sup>th</sup> July, 2019 on 29<sup>th</sup> July, 2019 as affirmed through the affidavit of service sworn by **Willis Odhiambo Agayi** on 30<sup>th</sup> July, 2019 and they have admitted knowing about the order by 4<sup>th</sup> December 2019, they still went ahead and disobeyed it by implementing the impugned legal notice.
- That the Applicant had filed the substantive application within the 21 days given by the Court, and served it upon the Respondent through the Ministry's Legal Department on 4<sup>th</sup> September, 2019. That it is therefore misleading for the contemnors to assert that they had acted in accordance with the advisory opinion of the Attorney General while disregarding the clearly worded order, and failing to respond to the substantive application which had been properly served. The learned Counsel referred to the decision of the Employment and Labour Relations Court in **Teachers Service Commission Vs Kenya National Union of Teachers & 2 Others [2013] eKLR**, and High Court decision in **Kenya Tea Growers Association Vs Francis Atwoli & 5 Others [2012] eKLR**, in which the case of **Clarke and Others Vs Chadburn & Others [1985] 1A11ER (PC) 211** was cited with approval.
- That Mr. Edward Kosgei, even after being served with the contempt application on the 7<sup>th</sup> February, 2020 continued to sign the leases in violation of the 26<sup>th</sup> July, 2019 order, as evidenced by the sample leases signed by him on 29<sup>th</sup> February, 2020 attached to the Applicant's affidavit sworn on 4<sup>th</sup> March, 2020.
- The learned Counsel referred to the Court of Appeal case of **Simmers Plaza Ltd Vs National Bank of Kenya Ltd [2015] eKLR**, which cited with approval the case of **Basic Criticos Vs Attorney General & 8 Others [2012] eKLR**, on the position that knowledge of the Court order supersedes personal service for the purposes of contempt proceedings.
- That the conduct of the contemnors represents a classic case where persons duly served, and aware of the existence of valid court orders, decide to disobey such orders through craft and innovation and hiding under alleged advisory opinions. That the Contemnors are guilty of disobedience of the orders issued on 26<sup>th</sup> July, 2019. That their conduct was unjustified and amounts to a calculated attack on the integrity and honour of this Court, and is further meant to bring the administration of justice into disrepute and contempt. That the contemnors as senior public servants are setting a bad precedent to other public servants and the general public, which acts needs to be rebuked and the Contemnors severely punished. The learned Counsel cited the decisions in the case **Sam Nyamweya & 3 Others Vs Kenya Premier League Ltd & 2 Others [2015] eKLR**, in which the Scottish case of **Stewart Robertson Vs Her Majesty's Advocate 2007 HCAC 63** was cited with approval, **Republic Vs Kenya School of Law & 2 Others exparte Juliet Wanjiru Njoroge & 5 Others (Supra)**, and **Econet Wireless Kenya Ltd Vs Minister for Information & Communication of Kenya & Another (Supra)**, in support of the position that every person against, or in respect of whom an order is made by a court of competent jurisdiction has a plain and unqualified obligation to obey the order, even where the person believes the order to be irregular or void, unless and until it is discharged.
- That the Court should order the Contemnors to appear before the Court for mitigation and sentencing upon making a finding that they are in contempt of the court order.

## **B. RESPONDENTS' SUBMISSIONS**

### **SUMMARY**

- That the orders the Contemnors breached were issued under **Order 53 and not Order 40 of the Civil Procedure Rules**. That **Order 40 of the Civil Procedure Rules** and **Section 29 of the Environment and Land Court Act** or any other provisions of the Civil Procedure Rules do not govern how the application should be disposed off. That the guiding provisions are the **Judicature Act Chapter 8, Order 52 Rule 2 of the Rules of the Supreme Court of England, 1965** and **Civil Procedure (Amendment) Rules, 2012 of England** as amended from time to time.
- That the application is incompetent for failure to comply with the provisions of **Part 81 of the New Civil Procedure Rules [England]** contained in the second supplement to the 2012 White Book as well as **Government Proceedings Act Chapter 40 of Laws of Kenya**. That the affidavit of service filed show the service was not upon the person or office of the Contemnors.
- That from the explanations tendered by the Contemnors, it is apparent they did not deliberately disobey the order of 26<sup>th</sup> July, 2019.
- That the Exparte Applicant breached **Section 13 of the Government Proceedings Act** by failing to serve the Order of 26<sup>th</sup> July, 2019 and pleadings in **Judicial Review No. 4 of 2019** upon the Attorney General. That the requirement to serve the Attorney

General is mandatory.

- The learned Counsel referred to this Court's decision in ***David Kiptum Yator & 2 Others Vs Attorney General & Others [2015] eKLR***, on the need to ensure the concerned persons are properly and duly served with the Order, and that the laid down procedures for punishing for contempt is meticulously observed.
- That contempt proceedings are a special kind of proceedings which are criminal in nature as they may lead to limitation of an individual's liberty. The learned Counsel referred to ***Re Bramblevale Ltd (1967) 3 A11 E.R. 1062***, at page 1063, and ***Gatharia Karanja Mutitika & Others Vs Baharini Farm Limited (1985) KLR 227*** on the standard of proof required in contempt proceedings which is undeniably, above balance of probabilities. That as the Applicant did not disclose how he obtained the internal memo dated 22<sup>nd</sup> January, 2020 and the lease dated 30<sup>th</sup> January, 2020 that he relies on as evidence of breach of the Order dated 26<sup>th</sup> July, 2019, the said documents should be disregarded as they are not strictly public documents within ***Section 79 of the Evidence Act*** for they are not certified as required under ***Section 80 of the said Act***.
- That the said documents were therefore illegally obtained evidence as they were not applied for and appropriate fee paid in accordance with ***Article 31 and 35 of the Constitution***, and ***Sections 7 to 13 of the Access to Information Act, 2016*** and hence are inadmissible. The learned Counsel referred to the Supreme Court of Kenya case in ***Njonjo Mue & Another Vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others (2017) eKLR*** and ***Okiya Omtatah Okoiti & Another Vs Attorney General & Another Nairobi CACA No. 13 of 2015***, where the Court stated that the use of information accessed without following the requisite procedures not only renders it inadmissible, but also impacts on the probative value of such information.
- That in the absence of evidence to show that the Contemnors had deliberately disobeyed the Order of 26<sup>th</sup> July 2019, the Court should find that the contemnors were persuaded by opinion of the Attorney General, ***Sections 2 and 23 of the Land Act, 2012*** as amended by the ***Land Laws (Miscellaneous Amendment) Act No. 18 of 2018***, that empowered the Cabinet Secretary to be solely responsible for issuance of leases and licences, and hold that they had the statutory obligation to act as they did.
- That there is no contempt to be purged by the Contemnors, and there is no need to set aside the order of the court. That the order as issued lacked certainty as the officers meant to continue issuing the leases and licences were not specified. That in view of ***Sections 2 and 23(2) of the Land Act*** as amended, no other officers would have legally issued leases and licences other than those so authorized without being ultra vires the said section.
- That Order of 26<sup>th</sup> July, 2019 cannot be implemented for it is not only ambiguous, but also claws back or purports to stay implementation of ***Sections 2 and 23(2) of the Land Act*** as amended, while the said provisions of the Act had not been challenged under the proceedings. That the Contemnors cannot be said to have been in contempt of the Court order when they were only implementing clear and express provisions in ***Section 2 and 23(2) of the Land Act*** as amended which had not been challenged or stayed.
- That unless the law is amended to divest the power to issue leases and licences from the Respondent, the order of 26<sup>th</sup> July, 2019 remained unimplementable and hence, clearly issued in vain. That the Respondent cannot therefore afford to allow the process of issuing of the leases and licences to be carried out in a manner that offends the statute due to their far reaching commercial significance. That the Court should uphold its fidelity to the law by exercising its inherent powers and give directions that would guarantee and ensure the public is protected and that Land transactions remains sacrosanct and that only authorized persons can transact on behalf of Kenyans.
- That the application is incurably defective, incompetent and lacks merit, and should be dismissed with costs.

4. The following are the issues for the Court's determinations;

- (a) *Whether the Order was properly served or when did the Contemnors get to know of the order.*
- (b) *Whether the Contemnors' actions amount to breach of the Court order or whether they are guilty of contempt of court.*
- (c) *Whether the application is properly before the Court and what orders to issue.*
- (d) *Who pays the costs of the application?*

5. The Court has carefully considered the grounds on the Motion, affidavit evidence tendered by both sides, the learned Counsel's written submissions, superior court's decisions cited therein, the record and come to the following findings;

- (a) That the Exparte Applicant had moved the Court through ***Eldoret ELC Misc. Civil Application No. 27 of 2019*** through a Motion under Certificate of Urgency dated 25<sup>th</sup> July, 2019 which was heard exparte. That the copy of the Order granted thereof and annexed to the Applicant's affidavit sworn on 6<sup>th</sup> February, 2020 and marked "PGG2" confirms that leave to apply for an order of certiorari, and declaration in respect of ***Legal Notice No. 106*** contained in Kenya Gazette Supplement No. 101 of 1<sup>st</sup> July, 2019 was granted. That the Court further ordered that ***"the leave granted should operate as a stay of the decision contained in or action taken pursuant to Legal Notice No. 106 contained in Kenya Gazette Supplement No. 101 issue of 1<sup>st</sup> July, 2019. In particular and for avoidance of doubt, the officers responsible for issuing leases or licences at the Ministry for Lands and Physical Planning immediately prior to the promulgation of Legal Notice No. 106 on 1<sup>st</sup> July, 2019 do continue to issue such leases or licences in relation to private land"***. That the court further set the period within which the application for the orders of certiorari

and declaration was to be filed to be twenty-one (21) days.

(b) That though the Contemnors' position is that the Order was not served upon them personally, the contents of the affidavit of service by Willis Odhiambo Agayi, sworn on the 30<sup>th</sup> July 2019, on the service of the Order and application upon the Respondent's Legal Officer, who acknowledged receipt by stamping and signing on the face of the principal copies, has not been challenged. That had the contents of the said affidavit have been challenged, the Respondent would probably have done so by an affidavit from the Legal Officer on duty at the office described on the 29<sup>th</sup> July, 2019 to confirm or repudiate service. That alternatively, they would have sought to have the deponent of the affidavit of service filed herein called for cross examination to test the veracity of his deposition.

(c) That the finding that the Order was served upon the Respondent's Legal Officer as in (b) above, and in the absence of evidence that the Officer did not have authority to receive Court documents, amounts to good service for the purposes of bringing its contents to the Respondent generally. That the Contemnors have protested that the Exparte Applicant ought to have ensured service of the Order upon the person or office of the Contemnors and the Hon. Attorney General, before seeking to have the Contemnors held in contempt. That the Contemnors did not get to know of the order of 26<sup>th</sup> July, 2019 until 4<sup>th</sup> December, 2019 through the Media. That however, the Contemnors have not disclosed what action or steps they took to verify the Media reports, like contacting their Legal Department that ordinarily receives court process for the Respondent. That having considered the positions taken by both sides on this matter, and upon considering the superior court's decisions cited on service of orders before basing contempt proceedings therefrom, it is undoubtedly clear that knowledge of a court order suffices. That the person(s) who is (are) shown to have known of the order and proved to have willingly and deliberately breached such order are liable for contempt, though not personally served with the order. The Court of Appeal in Simmers Plaza Ltd Vs National Bank of Kenya Ltd [2015] eKLR, cited with approval Basil Critocos Vs Attorney General & 8 Others [2012] eKLR, where it was held 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."***

(d) That further to the finding in (c) above, it is apparent from the letter by **Kennedy Ogeto**, Solicitor General in the Attorney General's Office dated 23<sup>rd</sup> December, 2019 and addressed to the Principal Secretary, Ministry of Lands and Physical Planning, that is attached to the Replying affidavit by Farida Karoney, the Cabinet Secretary in the said Ministry and marked "FK2", the Respondent knew of the order of 26<sup>th</sup> July, 2019 by the time they wrote to the Attorney General seeking for advisory opinion through their letter "**referenced MOLLP/ADM/CSO/1/240 dated 4<sup>th</sup> December, 2019.**" That though the Respondent has not disclosed where the Order had come from, it is doubtful that the source was the Media as alleged. The only reasonable conclusion the Court would come to is that the order was the one served upon their Legal Officer on the 29<sup>th</sup> July, 2019 as per the affidavit of service alluded to earlier.

(e) That **Order 53 Rule 1(2) of the Civil Procedure Rules** leaves no doubt that an application for leave "**shall be made ex parte to a Judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavit verifying the facts relied on.**" The application should be through Chamber Summons and not Notice of Motion. That upon the Court granting the leave application, any party who feels aggrieved with any of the order given therein would be at liberty to move the court as appropriate, either in the file where the leave application was dealt with or in the file where the substantive application by way of notice of motion is subsequently filed. That though the Contemnors appear in their replying affidavits and submissions in the contempt proceedings to show their dissatisfaction, they have not formally filed any application in this file or the Miscellaneous file for leave to challenge the order of 26<sup>th</sup> July, 2019 or the application thereof.

(f) That **Order 53 Rule 3(1) of the Civil Procedure Rules** provides that where leave has been granted to apply for an order of "**mandamus, prohibition or certiorari, the application shall be made within twenty-one days by notice of Motion...**" That as earlier pointed out above, the Exparte Applicant had been given 21 days to file his application through the order of 26<sup>th</sup> July, 2019. That contrary to the Respondent's and Contemnors' claim that the substantive application had not been filed by the time they received the advisory opinion from the Attorney General, the truth of the matter is that the Notice of Motion dated 6<sup>th</sup> August, 2019 had been filed in **Eldoret ELC Judicial Review No. 4 of 2019** on the 15<sup>th</sup> August, 2019 which was within the 21 days period. That the advisory opinion was therefore predicated on an erroneous mis-appreciation of facts.

(g) That **Article 23(3)(f) of the Constitution** and **Section 13(7)(b) of Environment and Land Court Act No. 19 of 2011** confirms that this Court is with jurisdiction to hear and determine matters seeking judicial review or prerogative orders. That though the contemnors may be right that some courts allow the filing and processing of applications for leave and the substantive application in the same file, the proper procedure is to have the two dealt with in separate files. That way, the chamber summons application for leave is dealt with in a miscellaneous application, while the substantive application by way of notice of Motion is commenced through a Judicial Review file. That the Court has perused the court record in this judicial review matter and noted there are only two affidavits of service. That the first is by Willis Odhiambo Agayi sworn on 30<sup>th</sup> July, 2019 about service of the order of 26<sup>th</sup> July, 2019 and application dated the 25<sup>th</sup> July, 2019 on the 29<sup>th</sup> July, 2019 upon the Legal officer at Ardhi House, 1<sup>st</sup> Floor, Room 102. That the second one is by Willis Agayi sworn on 20<sup>th</sup> February, 2020 about service of the Notice of Motion dated 6<sup>th</sup> February, 2020 for hearing on the 10<sup>th</sup> March, 2020 upon Edward Kiptoo Kosgey on 7<sup>th</sup> February, 2020 at Ardhi House, 4<sup>th</sup> Floor and upon **Mr. John W. Njogu**, Deputy Chief State Counsel on behalf of the Cabinet Secretary. That the Court has also traced the Notice of Appointment by **Mr. Denis Wabwire**, Senior State Counsel with the Attorney General coming on record for the Respondent in this judicial review matter. That there is no affidavit of service of the Notice of Motion dated 6<sup>th</sup> August, 2019. That nevertheless, the Court has no difficulty concluding that the notice of Motion dated the 6<sup>th</sup> August, 2019 and filed on the 15<sup>th</sup> August, 2019 had been served upon the Respondent by the time they instructed the Attorney General to come on record even in the absence of an affidavit of service. That had the Motion been served upon the Respondent on 4<sup>th</sup> September, 2019 as alleged by the Applicant through their Counsel's submissions, the Respondent would have instructed the Attorney General earlier to come on record and it would have

impacted on the advisory that was later given by the Attorney General on 23<sup>rd</sup> December, 2019.

(h) That noting that the contempt application dated 6<sup>th</sup> February, 2020 was served upon the Contemnors as detailed in the affidavit of service sworn on 20<sup>th</sup> February, 2020 unlike the Order of 26<sup>th</sup> July, 2019 that was served upon the Legal Officer on 1<sup>st</sup> Floor Room 102, as per the affidavit of service sworn on the 30<sup>th</sup> July 2019, and that the Contemnors acted within days and filed their replying affidavits by 24<sup>th</sup> February 2020, then their explanation that they had not known of the order until 4<sup>th</sup> December, 2019 appear convincing. That is especially so as there is no affidavit of service of the Motion dated the 6<sup>th</sup> August, 2019 and filed on the 15<sup>th</sup> August, 2019 that would have confirmed the exact date and office of service of that substantive application. That taking it that the application had not been served by 23<sup>rd</sup> December, 2019 when the Hon. Attorney General, through the Solicitor General rendered their advisory to the Respondent, then the position therein may not be faulted as the stay order of 26<sup>th</sup> July, 2019 would have lapsed on or about 15<sup>th</sup> August, 2019 had the substantive application not have been filed.

(i) That further to (h) above, the Court can only conclude that the Respondent got served with the Notice of Motion dated 6<sup>th</sup> August, 2019 and filed on the 15<sup>th</sup> August, 2019 days before the 15<sup>th</sup> January, 2020 when the Attorney General filed a Notice of Appointment for the Respondent. That by the time the contempt application dated 6<sup>th</sup> February, 2020 was filed to-date, the Respondent has not moved the Court formally to challenge the orders of 26<sup>th</sup> July, 2019.

(j) That the Applicant's basis of seeking to have the Contemnors held to be in contempt is the contents of the copies of the internal memo dated the 22<sup>nd</sup> January, 2020 by the Director, Land Administration, leases in favour of **Grace Wanja, Margaret Wambui Maina, Richard Kipkoech, Francis Ngure and Stephen Nduguta** signed by Edward K. Kosgei No. 002 on 30<sup>th</sup> January, 2020 and 24<sup>th</sup> February, 2020. That the learned Counsel for the Respondent and Contemnors has challenged the admissibility of the said documents in their submissions. That it is their case that the said documents are not certified as true copies by the office that ordinarily has legal custody of the same. That further, the Applicant has not established that he obtained the copies of the said documents procedurally and lawfully in compliance with **Sections 7 to 13 of the Access to Information Act, No. 31 of 2016**, and **Articles 31 and 35 of the Constitution**, and hence are a contravention of **Section 80 and 81 of the Evidence Act Chapter 80 of Laws of Kenya**. The Supreme Court of Kenya in **Njonjo Mue & Another Vs Chairperson of Independent Electoral and Boundaries Commission & 3 Others [2017] eKLR** pronounced itself on the illegally obtained evidence as follows;

*“Having found that there are procedures provided for under the law through which any person who seeks to access information should follow, the question that follows is; what happens where a person “unlawfully” or “improperly” obtains any information held by an entity”. Can a court of law admit such evidence... We also recognize that information held by the State or State organs, unless for very exceptional circumstances, ought to be freely shared with the public. However, such information should flow from the custodian of such information to the recipients in a manner recognized under the law without undue restriction to access of any such information...Further, a duty has also been imposed upon the citizen(s) to follow the prescribed procedure whenever they require access to any such information. This duty cannot be abrogated or derogated from, as any such derogation would lead to a breach and/or violation of the fundamental principles of freedom of access to information provided under the Constitution and the constituting provisions of the law. It is a two way channel where the right has to be balanced with the obligation to follow due process.....*

*The Petitioners, using the above test, do not show how they were able to obtain the internal memos showing communication between employees of the 2<sup>nd</sup> Respondent. Further, it has been alleged that these memos have only been shown in part, and taken out of context to advance the Petitioners' case against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, and to an extent, the 3<sup>rd</sup> Respondent. No serious answer has been given to that contention. The use of such information before the Court, accessed without following the requisite procedures, not only renders it inadmissible but also impacts on the probative value of such information.”*

The court of Appeal in the case of **Okiya Omtatah Okoiti & Another Vs Attorney General & Another, Nairobi CACA No. 13 of 2016** held as follows:

*“...Based on the foregoing, the appellants ought to have requested the concerned government Departments to supply them with the information they required, and to which they were entitled to receive in accordance with Article 35 of the constitution. It was not necessary for the appellants to resort to unorthodox or undisclosed means to obtain public documents. If they deemed the documents were relevant (as indeed they were) then, they ought to have invoked the laid down procedure of production of documents.”*

*84. We therefore agree with the learned Judge that it would be detrimental to the administration of justice and against the principle underlying Article 50(4) of the Constitution to in effect countenance illicit actions by admission of irregularly obtained documents. However well intentioned “conscientious citizens” or “whistleblowers” might be in checking public officers, there can be no justification, as pointed out by the Supreme Court, for not following proper procedures in the procurement of evidence. We do not have any basis for interfering with the decision of the High Court to expunge the documents in question.”*

That in view of said provisions of the Law and the decisions in the two cases by the Supreme Court and Court of Appeal of Kenya, which are binding to this court, there is no difficulty in holding that the copies of the internal memo and leases are inadmissible in evidence.

(k) That notwithstanding the finding in (j) above that the documents the Applicant intended to rely on to prove that the Contemnors are in breach of the Order are inadmissible in evidence, the Contemnors have through the replying affidavit by Farida Karoney sworn on the 24<sup>th</sup> February, 2020, especially paragraphs 20 and 21 admitted that the officers in the impugned legal notice have been issuing and signing leases and licences since 22<sup>nd</sup> January, 2020 and since then **“several titles have been issued and interests conferred bonafide to members of the public from the resultant leases and licences.”** That the Contemnors' actions have been

explained to have emanated from the Attorney General's advisory opinion through the Solicitor General's letter dated the 23<sup>rd</sup> December, 2019. That as of the date of that letter, there is no evidence tendered that the Hon. Attorney General had been served with the pleadings herein and the order of 26<sup>th</sup> July, 2019 by the Applicant as required by **Section 13 of the Government Proceedings Act**. That the court cannot also assume that the order served upon the Legal Officer at Ardhi House, 1<sup>st</sup> Floor, Room 102 on 29<sup>th</sup> July, 2019 had been brought to the attention of the Contemnors by the 22<sup>nd</sup> January 2020, without evidence being presented by the Applicant, who should have done more in trying to effect service upon the Contemnors directly, for example through an advertisement in a newspaper with a national distribution.

(l) That the position taken by the learned Counsel for the Respondent and Contemnors that the order is ambiguous and incapable of implementation has no basis. That the impugned Legal Notice that was attached to the Applicant's affidavit in support of the application for leave sworn on 25<sup>th</sup> July, 2019 and marked "PGG1" states as follows;

**"LEGAL NOTICE NO. 106**

**THE INTERPRETATION AND GENERAL PROVISIONS ACT**

**(Cap. 2)**

**DELEGATION OF POWER**

***IN EXERCISE of the powers conferred by section 38 (1) of the Interpretation and General Provisions Act, the Cabinet Secretary for Lands and Physical Planning delegates to the –***

***Director, Land Administration, Deputy director Land Administration, Senior Assistant Director - Land Administration, Principal Land Administration Officer, and Chief Land Administration Officer, the power to issue leases or licences conferred on the Cabinet Secretary by Section 23(2) of the Land Act No. 6 of 2012).***

***This Notice shall be deemed to have come into operation on the 18<sup>th</sup> January, 2019.***

***Dated the 14<sup>th</sup> June, 2019.***

**FARIDA KARONEY**

***Cabinet Secretary for Lands and Physical Planning***"

That as can be seen in the legal notice, Farida Karoney, the Cabinet Secretary for Lands and Physical Planning acted pursuant to **Section 38(1) of the Interpretation and General Provisions Act** to delegate to the listed offices, including the Director Land Administration, the powers conferred on the Cabinet Secretary by **Section 23(2) of the Land Act No. 6 of 2012** to issue leases and licences. The decision or action under that Legal Notice is the one that had been stayed under Order Number 3 of 26<sup>th</sup> July, 2019 in the following words;

***"3. Moreover, the leave granted should operate as a stay of the decision contained in or action taken pursuant to Legal Notice No. 106 contained in Kenya Gazette Supplement No. 101 issue of 1<sup>st</sup> July, 2019."***

That order is not ambiguous, and until it is successfully challenged in accordance with the law, the concerned state agencies, especially the Cabinet Secretary, Ministry of Lands and Physical Planning, and those under her, are obligated to obey it from the date it was brought to her knowledge. That should evidence be availed to prove above balance of probabilities that the Contemnors have willfully and deliberately breached the order. The Court would proceed to find them to be in contempt and to order the appropriate sanctions. That the explanation given by the Contemnors that they acted as they did upon receipt of the advisory opinion from the Attorney General vide the letter dated the 23<sup>rd</sup> December, 2019 has not been challenged or disputed. That the advise may well have been erroneous as it was based on the wrong assumption that the Applicant had not filed the substantive application within the 21 days given in the order of 26<sup>th</sup> July, 2019. That as held by the court earlier, there is no evidence tendered that the Contemnors and the Attorney General had been served with the substantive application dated 6<sup>th</sup> August, 2019 and filed on the 15<sup>th</sup> August, 2019 by the time the advisory opinion was communicated to the Respondent. That there is therefore no evidence tendered to suggest that the advisory opinion was prepared and communicated with the sole aim of willfully and deliberately furthering the breach of the order. That the court therefore finds that the Applicant has failed to prove to the standard required by the law that the Contemnors had willfully and deliberately breached the stay order of the 26<sup>th</sup> July, 2019.

(m) That though the finding in (l) shows that the Applicant has failed in his contempt application, the Court has a duty to ensure that its orders are not willfully and deliberately disobeyed. The High Court in the case of **Kenya Tea Association Vs Francis Atwoli & 5 Others [2012] eKLR** cited with approval the case of **Clarke and Others Vs Chadburn & Others [1985] 1 A11 E.R. (P.C.) 21**, in which the Court stated;

***"I need not cite authority for the proposition that it is of high importance that orders of the court be obeyed, willful disobedience to an order of the court is punishable as a contempt of court and I feel no doubt that such disobedience may properly be described as illegal...even if the Defendants thought that the injunction obtained was too wide in its terms, that provides no***

*excuse for disobeying it. The remedy is to vary or discharge it.”*

That this court is in agreement with the import of that position as parties cannot be allowed to cherry pick what court order, or part of such order to obey, and which not to obey. To do so would result to chaos and amount to an affront to the authority of the Courts, and supremacy of the law. In the case of *Sam Nyamweya & 3 Others Vs Kenya Premier League Ltd & 2 Others [2015] eKLR*, which cited the *Scottish decision of Steward Robertson Vs Her Majesty's Advocate 2007 HCAC 63* is relevant. That further in the case of *Republic Vs Kenya School of Law & 2 Others Exparte Juliet Wanjiru Njoroge & 5 Others [2015] eKLR*, the Court held that;

*“where it has been brought to the court’s attention that its orders are being abrogated or abridged by brazen or subtle schemes and maneuvers in the name of statutory provisions this court cannot turn a blind eye to the same. This Court having made a decision which decision has not been stayed, to content that the decision cannot because of the alleged statutory provisions in my view the highest height of incivility coming from persons in charge of institutions...”*

That the view presented by the Respondent and Contemnors though their learned Counsel’s submissions that the order of 26<sup>th</sup> July, 2019 cannot be implemented for to do so would amount to staying the implementation of **Sections 2 and 23(2) of the Land Act No. 6 of 2012** as amended, which sections have not been challenged is not only unfortunate but misleading. That the order of 26<sup>th</sup> July, 2019 not only stayed the implementation of the impugned legal notice, but gave the Respondent, and by extension the Country, the opportunity to have the leases and licences continue being issued and signed by those officers who had previously so acted before the impugned Legal Notice. That those officers definitely still fall under the Cabinet Secretary, Ministry of Lands and Physical Planning, the Respondent, and cannot therefore be described as *“anonymous persons”*. That accordingly, and now that the Contemnors and generally the Respondent, know of the order of 26<sup>th</sup> July, 2019 and the existence of the judicial review application, the Court expect that they will now obey the Court order until and or unless it is discharged by this court or the appeals court.

(n) That on the issue of whether or not the application is properly before the Court, and after carefully considering the law and decided superior court cited by both Counsel in their submissions, the court finds no leave was required to be obtained before filing of the contempt application in view of the Court of Appeal decision in *Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others [2014] eKLR*, where it was concluded thus;

*“... We find that from basis of the new Civil Procedure Rules (of England), no leave is required before bringing an application like the one before us for committal for contempt relating to breach of this court’s order...”*

(o) That though the Applicant has failed in the application, it is only fair and just that the costs of the application be in the cause in view of the orders the Court will make hereinbelow.

6. That flowing from the foregoing, the Court orders as follows:

(a) *That the Applicant’s Notice of Motion dated and filed on 6<sup>th</sup> February, 2020 is without merit and is dismissed with costs in the cause.*

(b) *That the Respondent granted thirty (30) days from today to ensure compliance with order number 3 of 26<sup>th</sup> July, 2019.*

**Orders accordingly.**

**Delivered virtually and dated at Eldoret this 25<sup>th</sup> day of November, 2020.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Exparte Applicant: Absent.

Respondent: Absent.

Counsel: Mr. Ochieng for Awuor for Applicant.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.