



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L PET 15 OF 2013

Formerly ELD HCPT NO. 6 of 2013

IN THE MATTER OF ARTICLES 2, (6), 10(2),(b),63 (d), (I), and (ii) and 258 of the Constitution of Kenya 2010

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 11, 19(C), 25(a) , 28, 29(C) 43, 56, and 63 (d),

(I) and (ii), OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF VARIOUS PROVISIONS OF INTERNATIONAL HUMAN RIGHTS LAW

BETWEEN

DAVID KIPTUM YAROR

LUKA TOROITICH KIRATON

JOSEPH CHETORUS

(Suing as Leaders of the Sengwer Community.....PETITIONERS

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST RESPONDENT

KENYA FOREST SERVICES.....2ND RESPONDENT

ZONAL FOREST MANAGER MARAKWET DISTRICT.....3RD RESPONDENT

THE DISTRICT COMMISSIONER MARAKWET EAST DISTRICT.....4TH RESPONDENT

NATIONAL LAND COMMISSION.....5TH RESPONDENT

RULING

1.0 INTRODUCTION

The application dated 19th February 2014 arises from the decision of Justice Fred

Ochieng made on 25/3/2013 wherein he ordered that:-

“In order to ensure that the petition is not rendered a mere academic exercise, I direct that a conservatory order issues forthwith in respect of the petition. In effect this order restrains the Kenya Forest service and the other respondents from interfering with the petitioners occupation control and quiet enjoyment of the land they and the members of Senquer Community live on at the Embobut forest. This order shall remain in force until 8/4/2013 when the application shall be heard Inter partes”

The interim orders were in force until in January 2014 when it is alleged that in January 2014 the Kenya Forest Service Officers and a contingent of Administration Police Officers descended on their glade with guns and other sophisticated weapons as a result of which the petitioners ran away because they were scared. There had been threats by the Government that they would be arrested because the land in issue belonged to the Government. Due to this acts by the Government, the petitioners moved the Court on 17 January 2014 for further orders to ensure the Court order issued on 25/3/2013 was complied with. The honourable Justice Munyao granted the petitioners the order sought and further directed the County Police Commandant, Elgeyo Marakwet County to furnish the honorable court with a report demonstrating compliance with his order. The report was filed on 10th February 2014. This matter was to be mentioned on 6/2/2014 for directions however, on the said date, the judge was unwell hence the matter was stood over to 29/2/2014. The interim orders were extended.

On the 12/2/2014, the petitioner commenced the application for contempt by seeking leave to file contempt proceedings against the respondents. The said leave was granted instantly with directions that the application was to be filed within 14 days.

The Notice of motion was ultimately filed on 19/2/2014, wherein the petitioners seek this Court to make a declaration of willful disobedience of a lawful order issued by the court against such of the Respondents or any other person found after the hearing of the application to have been guilty of such disobedience of any of the orders issued by this court. The Respondents or respective officers or any such person as shall at the hearing be deemed to have been aware of the orders and whoever disobeyed any such order be committed to civil jail for six months or such other period as the court may order for contempt of court. The respondents or such of them as shall be found guilty of disobeying court orders together with any other person found to have been aware of the court order and whoever disobeyed any such court orders be condemned to pay such fine as shall be commensurate or reasonably proportional to punishment for disobedience of the Court orders

The application is based on grounds that the Honourable Justice Fred A. Ochieng sitting as the Resident Judge of this Honourable Court issued Conservatory orders on the 26th March, 2013 specifically restraining all the Respondents from interfering with the Petitioners occupation, control and quiet enjoyment of the land they and the members of the Sengwer Community live on at the Embobut Forest pending the hearing and determination of the petitioner's application dated 22nd March 2013 inter parties. The Order duly endorsed with the Penal Notice was served upon the Respondents.

The petitioners allege that the respondents contrary to the court order served upon them proceeded to commit acts of contempt thus Issuing eviction notices against the Petitioners and other members of the Sengwer Community living in Embobut Forest, Making press statements which are inconsistent with the Court Order and aimed to defeat the purpose and intent of the court order and forcefully evicting the Petitioners and other members of the Sengwer Community from their land in Embobut Forest. The petitioners claimed that the respondents threatened and actually used force including live bullets against the petitioners and other members of the Sengwer community at the time of eviction and burnt houses belonging to the petitioners and other members of the Sengwer community as a means of evicting them from Embobut Forest hence exposing them to the vagaries of bad weather. Lastly the petitioners claim that the respondents destroyed their property and property of other members of the Sengwer community as a way of forcing them out of the Forest hence disenfranchising them economically and depriving them a vital source of livelihood and Prevented the petitioners/applicants and other members of the Sengwer community from re-entering their homes in Embobut Forest.

The application is supported by the affidavit of **David Yator Kiptum, Luka Toroitich Kiraton** and **Joseph Cheptorus** sworn On 19/2/2014, 10/2/2014 respectively. The import of this affidavits is that they filed the petition herein on their own behalf and representatively on behalf of all the members of Sengwer community living in Embobut forest of Elgeyo/Marakwet County. That they learnt of plans by the Respondents to evict members of the Sengwer Community from Embobut Forest sometimes early in the year 2013 and therefore filed a petition on 22nd March, 2013 challenging the aforementioned eviction and seeking protection of their constitutional and ancestral rights. The petition was accompanied by an application dated 22nd March, 2013 seeking temporary injunctive and/or conservatory orders restraining the Respondents from interfering with their occupation, control, and quiet enjoyment of their land at Embobut forest. Upon hearing their Application, the Honourable Justice Fred A. Ochieng issued conservatory orders on the 26th March, 2013 pending the hearing and determination of the application interpartes. The application was initially set down for interparties hearing on 8th April, 2013 but it did not proceed and the temporary conservatory orders were extended which orders have since remained in force and have never been varied or set aside by any court. The petitioners contend that the Respondents were served with the aforementioned court order duly endorsed with the Penal Notice but willfully and derogatorily took to actively disobeying the court order.

Mr. Arthur Osinya the County Commissioner Elgeyo Marakwet County in the Ministry of Interior and Coordination of National Government under the Presidency deponed to the replying affidavit on behalf of the 1st and 4th Respondents. The import of the replying affidavit was that the owners of the structures moved out voluntarily and were not forced out and a number of them burned their structures as they moved out. The National Police service did not evict anyone as alleged. However, in the affidavit it is admitted that his office received a notice to vacate dated 5/12/2013 from Kenya Forest Service which was a general notice to enable KFS to start re-forestation and restriction of the Embobut forest.

On the 3/3/2014 the head of North Rift conservancy, **Mr. Solomon Mibey** filed a replying affidavit denying that their officers are in contempt of court in respect of the order dated 25/3/2013. The petitioners through Luka Toroitich Kiraton filed a further supporting affidavit on 10th March 2014 stating that this petition was presented and remains so presented on behalf of the Petitioners and all the members of Sengwer community but it has been difficult to obtain all the names of those affected since they have been displaced by the forceful eviction from their homes hence scattered in many places at the moment. They denied any compensation as no evidence of any such payment has been tendered before court and the same remains an allegation more so in relation to the Sengwer community; and that no agreement or evidence thereof has been presented to confirm the allegation that the members of the Sengwer community had agreed to move out of Embobut forest. Embobut forest was invaded and used as a home by various factions of people including; illegal settlers, internally displaced persons, victims of land slides and other people not from Sengwer community and that if any payment was made to any one then it must be distinguished to know who such persons were and the essence of their being paid;

On 21/5/2014, **Mr. David Yator Kiptum** filed a further affidavit pursuant to a court order made on 10/4/2014 stating that the status report made by the Elgeyo County Police Commander was filed outside the time frame directed by this Honourable court which is a further act of contempt of court. The report admits in various parts the intentional eviction carried out by the respondents contrary to the court order. That the various acts of contempt of court were the subject of wide media coverage in both electronic and print media. On the issue of compensation he states that no evidence of any such payment has been tendered before court and the same remains an allegation more so in relation to the Sengwer community and no agreement or evidence thereof has been presented to confirm the allegation that the members of the Sengwer community had agreed to move out of their homes in Embobut forest. That no consultations have been made between the members of Sengwer community and the Respondents or any person regarding any alleged payment.

2.0 SUBMISSIONS

On the hearing date, counsel on record for the petitioner **Mr Kenei** correctly summarized the issues to be determined as follows;

1. Whether there is a valid court order
2. What is the standard of proof in contempt
3. whether the court order has been breached.
4. Who has breached the court order
5. what is the penalty for breach of the court order.

Mr. Kenei submitted that Hon. Justice Fred Ochieng granted an injunctive order on 25/3/2013 which order was to prevent the respondents from interfering with the occupation of Embobut forest by Sengwer Community. The order was made, the affidavit of service was filed hence the respondents were aware of the existence of the orders and yet the 2nd and 3rd Respondents through its officers descended on Embobut forest and evicted the Sengwer people forcefully destroying their property. He argues that the order has never been discharged or set aside. On the standards of proving contempt, he correctly submits that the same is higher than **“balance of probabilities”** but lower than **“beyond reasonable doubt.”** On the issue of the remedy he argues that the respondents should be committed to jail for 6 months. However, the court can compel the respondents to purge the contempt thus bringing back the petitioners to where they were before the alleged acts of contempt.

In support of the petitioner's case Mr Kenei supplied the honourable court with a bulk of cases which include the following; Kenya Tea Growers Association vs. Francis Atwoli & 5 Others [2012]eKLR, where the learned judge Lenaola J. observed that time and time again, our Courts have looked to the decision in Hadkinson vs. Hadkinson [1952] All E.R. 567 as expressing the law on the subject of contempt of Court Orders. It was held 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 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;

The Court would only refuse to hear a party to a cause when the contempt impeded the course of justice by making it more difficult for the Court to ascertain the truth or to enforce its orders and there was no other effective means of securing his compliance. The Court might then in its discretion refuse to hear him until the impediment was removed or good reason was shown why it should not be removed.”

The reasoning of the learned judges in that case (Somervell, Denning and Romer, L.JJ) is plain and obvious; of what use are Court Orders if those to whom they are directed, look at them with disdain? How can the dignity and independence of the Courts be maintained if the Orders they issue are contemptuously ignored?”

In setting out the standard of proof the leaned judge reiterated as follows;

“ The next issue to address is whether the actions and/words of Atwoli and Oyuga aforesaid amounted to contempt of Court. In Mutika vs. Baharini Farm Ltd [1985] KLR 227, it was held that the standard of proof in contempt matters is higher than a balance of probability but not exactly beyond reasonable doubt. In some cases, however the “beyond reasonable doubt” standard has been invoked.

And while insisting on the need to obey court orders, the learned judge Lenaola J further observed as follows;

“I say this because it does not matter that he may have been acting for a greater good. Court Orders must always be obeyed. In Clarke and Others vs Chadburn & Others [1985] 1 All E.R. (PC) 211, it was held as follows;

“An act done in willful disobedience of an injunction or Court Order was not only a contempt of Court but also an illegal and invalid act which could not, therefore, effect any change in the rights and liabilities of others.” I need not cite authority for the proposition that it is of high importance that orders of the courts should 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 being illegal. If by such disobedience the persons enjoined claim that they have validly effected some change in the rights and liabilities of others, I cannot see why it should be said that although they are liable to penalties for contempt of Court for doing what they did, nevertheless those acts were validly done ... but the legal consequences of what has been done in breach of the Law may plainly be very much affected by illegality. It seems to me on principle that those who defy a prohibition ought not to be able to claim that the fruits of their defiance are good, and not tainted with illegality that produced them ... even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.” (Emphasis added)”

The second authority relied upon by the Applicant is Justus Nyaribo v Clerk Nyamira County Assembly [2013] eKLR, Chief Magistrate Courts at Nyamira, Petition No. 2 of 2013, where the learned Resident Magistrate Okumu RM in citing the case of Hadkinson –vs- Hadkinson 2 ALL ER 1952 p.569, reiterated as follows;

“In conclusion I wish to point out that a court order must be obeyed whether one agrees with it or not. The order must be obeyed first, thereafter a person aggrieved by it should mount proceedings to either set it aside or review it.

As per Hadkinson –vs- Hadkinson 2 ALL ER 1952 p.569.

“It was the plain and unqualified obligations 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”

The applicant has also relied on the case of Ibrahim Haji Issack vs. Kenya Meat Commission & Another [2013] eKLR, at the Industrial Court at Nairobi Cause No. 1052 2013 where the learned judge Marete J. stated that a ***court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.***

In the case of Kenya Tea Growers Association Vs Francis Atwoli and 5 Others [2012] eKLR Lenaola J cited with approval the case of Clarke and Others Vs Chadburn & Others [1985] 1All E.R (PC), 211 in which the court observed that:

“I need not cite authority for the proposition that it is of high importance that orders of the courts should 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 being illegal....even if the Defendants thought that the injunction was improperly obtained or too wide in its terms, that provides no excuse for disobeying it. The remedy is to vary or discharge it.”

As was held in the case of Econet Wirelss Ltd Vs Minster for Information & Communication of Kenya & Another [2005] eKLR

“Where an application for committal for contempt of court orders is made the court

will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious – a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”

In the case of Teachers Service Commission Versus Kenya National Union of Teachers & 2 Others, Industrial Court Petition No. 23 of 2013 the Honourable court relied on the following authorities;

In the Mutitika Case (supra) the Court held that:

“A person who, knowing of an injunction, or an order of stay willfully does something, or causes others to do something, to break the injunction or interfere with the stay is liable to be committed for contempt of court as such person has by his conduct obstructed justice.”

In the case of Econet wireless Kenya Limited v Minister for Information Communication of Kenya & Another (2005) eKLR the High Court held that:

... It is a fundamental principle of the Rule of Law that court orders must be obeyed. The importance of this principle has been stated in many decisions in our courts and in particular the Court of Appeal.

To demonstrate the importance and seriousness with which the courts will deal with any conduct that may be deemed or found to be in contempt of court of prejudicial process, it may be necessary to look at some decisions of the subject.

In Gubabchand Popatial Shah & Another, Civil Application No. 39 of 1990 (unreported), the Court of Appeal said:

“...It is essential for the maintenance of the Rule of Law and good order that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnor...”

In Hadkinson v Hadkinson (1952) 2 All ER 567, it was held that:

It is plain and unqualified obligation of every person against or in respect of who 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 even void.”

And the fourth case relied upon by the Petitioner/Applicant is the case of Teachers Service Commission v Kenya National Union of Teachers & 2 others [2013] eKLR, Industrial Court at Nairobi, Petition Number 23 of 2013 where the learned judge Ndolo J. observed as follows;

“ A court order is not a mere suggestion or an opinion or a point of view. It is a directive that is issued after much thought and with circumspection. It must therefore be complied with and it is in the interest of every person that this remains the case. To see it any other way is to open the door to chaos and anarchy and this Court will not be the one to open that door. If one is dissatisfied with an order of the court, the avenues for challenging it are also set out in the law. Defiance is not an option.

As was held in the case of Econet Wirelss Ltd Vs Minister for Information & Communication of

“Where an application for committal for contempt of court orders is made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with and if the contempt is proven to punish the contemnor or demand that it is purged or both. For instance an alleged contemnor will not be allowed to prosecute any application to set aside orders or take any other step until the application for contempt is heard. The reasons for this approach are obvious- a contemnor would have no right of audience in any court of law unless he is punished or purges the contempt.”

Mr. Odongo, Litigation counsel in Attorney General's chambers on his part submitted that the petitioners have not proved the contemptuous acts against the respondent and that they have not met the required standards of evidence for the respondents to be convicted of contempt. The fourth respondent claims that the forest dwellers left voluntarily upon compensation. The National police service only ensured that there was security. He argues that the police arrived at the scene after all bonafide dwellers had left after compensation.

Professor Sifuna for 2nd and 3rd Respondents argued that in contempt proceedings, the person alleging that there is contempt must prove that there is an existing court order that is valid certain and unambiguous. Contempt proceedings are not meant to console, condole or massage egos of parties.

He argues that the contempt proceedings are defective as the correct procedure was not strictly followed and that a notice of the said proceedings ought to have been issued to the office of the Attorney General. He argues further that the applicant has introduced new grounds as the grounds in the statement are different from the grounds in the Notice of motion.

Most importantly, he argues that the respondent has not discharged his burden of proof and that the status report filed by the police is the only authentic document. Moreover that the entire application has been compromised since the applicants have been paid. Professor Sifuna further argues that the order was only meant to protect 3 petitioners and not the entire community.

In support of their foregoing arguments, the 2nd and 3rd Respondents relied on the list of authorities dated 3rd December 2014 which comprises the Judicature Act, Cap 8 Laws of Kenya, Order 52 of the Rules of the Supreme Court of England and the following cases;

-----*Gatharia K. Mutitika and 2 others V Baharini Farm Ltd. (1982-1988) KLR 863*, where the Court of Appeal; Hancox, Nyarangi & Gachuhi JJA., on setting the applicable standard for contempt of court stated that **“...a standard which is higher than proof on a balance of probabilities but not as high as proof beyond any reasonable doubt”**;

-----*Republic vs. County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011]eKLR, H.C at Nakuru Judicial Review Case No. 74 of 2010* where the learned judge Ouko J. enumerated the procedure to be followed in instituting the Contempt of Court Proceedings and observed that

“As was held in the case of Jacob Zedekiah Ochino & Another v George Aura Okombo & 4 others, Civil Appeal No.36 of 1989, contempt of court proceedings being an offence of a criminal character, as a man may be sent to jail (Re Breambleville Ltd. (1969) 3 All ER 1062 at p.1063, the correct procedure must be followed in bringing the application for contempt.”

-----*Ex-Parte Peter Nyamu Karaguri Muhuri Karaguri V Attorney General Of Kenya & 5 Others[2013]eKLR, H.C at Nairobi Civil Miscellaneous Application 405 of 2007*, where the learned judge Odunga J. noted that a notice for motion seeking committal orders as a result of contempt 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 learned judge Odunga J. further in the foregoing case while stating the procedure to be followed in contempt proceedings observed as follows; that the applicant must seek leave to institute contempt proceedings and that once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. The judge held that under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the sub rule states that “unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse.

-----Joseph Peter Gichoya Mbogo C/O Stephen Macharia Kimani Adv V Patrick Dennis Ok’eeffe & another [2006] eKLR H.C at Malindi Civil Case No. 17 of 2005 where the learned judge judge Ouko J. faulted the procedure for contempt and held that under Order 52 rule 3(3) of the Rules of the Supreme Court of England the Notice of Motion accompanied by a copy of the statement and affidavit in support of the application for leave must be served personally on the person sought to be committed.

-----Housing Finance Company of Kenya Ltd v Ngige Kitson Mondo [2006] eKLR, H.C At Nairobi, Civil Suit No. 780 of 2000. where the learned judge Kasango J opined that jurisdiction for contempt ought to be exercised carefully, circumspectly and must be jealously and carefully watched as it was held in Re Maria Annie Davies [1889] 21 QBD. The learned judge further noted that the order being alleged to be disobeyed must be clearly interpreted without any iota of contradiction.

-----National Bank of Kenya Ltd v County Council Of Olekejuado & 2 others [2013] eKLR, H.C at Machakos Civil Miscellaneous (JR) No. 5 of 2012. where the learned judge Mutende J. while outlining the procedure for contempt proceedings and hence declining to grant leave to the Ex-Parte Applicant to institute Contempt proceedings observed it is a requirement that the applicant gives a notice of the application for leave to the registrar and noted that the Registrars's office is equated to the Crown Office and in Kenya the Attorney General's Office.

The 5th Respondent, the National Land Commission did not respond to the instant application.

FINDINGS

I have considered the rival submissions by parties and do frame the issues for determination as follows;-

A) WHETHER THIS WAS A REPRESENTATIVE SUIT AND WHETHER THE ORDER ISSUED ON 25/3/2013 AFFECTED ALL THE MEMBERS OF SENGWER COMMUNITY.

On this issue the court finds that a casual look at the petition, one would conclude that the same is brought by 3 petitioners on behalf of the petitioners listed in the schedule annexed to the petition. Unfortunately, this schedule was not annexed on the petition. However looking at the prayers sought in the petition, the same are designed to protect the whole of the Sengwer Community from eviction from Embobut forest and therefore the petition qualifies as a representative suit and that though the order obtained by the petitioners on the 25th March 2013 on the face of it appear to have protected the petitioners only from eviction I do hold that a forensic perusal of the petition and the application and the order made on 18/1/2014 suggests that the whole community was covered by the order.

Article 22(1) and (2) of the Constitution of Kenya provides for Locus Standi in the enforcement of Bill of Rights. ***Article 22 (2) Provides that in addition to a person acting in their own interest, court proceedings under clause (1) (b) may be instituted by a person acting as a member of, or in the interest of a group or class of persons.***

On the issue as to whether the said orders covered the Petitioners together with the members of Sengwer Community, the 2nd and 3rd Respondents through their pleadings and their counsel *Prof Sifuna*, have argued and submitted that the said orders only covered the Petitioners who are the

Applicants herein. A close scrutiny of the Orders given shows that the first limb of the order covered the Petitioners while second order covered both the Petitioners and the members of Sengwer Community. It is important to note that although members of the Sengwer Community are not expressly part of the Petition but they are the beneficiary of the same by virtue of Articles 22 and 258 of the Constitution of Kenya 2010 which empowers any person to file a petition on his behalf and or on behalf of any other person and or persons or group of persons.

In *John Mining Temoi & Another v Governor of Bungoma County & 17 others [2014] eKLR, H.C at Bungoma Petition No. 2 of 2014*, the learned judge Mabeya J. held as follows;

“I have considered the opposing arguments on this issue. I am of the view that Article 22(1) and (2) of the Constitution has expanded the horizons of locus standi in matters of enforcement of fundamental rights and freedoms. The same provides that:-

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by–

- 1. a person acting on behalf of another person who cannot act in their own name;***
- 2. a person acting as a member of, or in the interest of, group or class of persons;***
- 3. a person acting in the public interest; or***
- 4. an association acting in the interest of one or more of its members.”***

The above provision is also similar to Article 258 which gives any person unhindered access to the courts where the Constitution has been contravened or there is threatened contravention of the Constitution. A literal interpretation of Articles 22 and 258, in my view confers upon any person the right to bring action in more than two instances. Firstly, in the public interest, and secondly, where a breach of the Constitution is threatened in relation to a right or fundamental freedom. Where one purports to enforce the rights of another, it is my view that there must be a nexus between the parties. In this case, Mr. Khaoya has described himself as the “**CEO/COORDINATOR**” of the organization and the Petition is about alleged violation of the Constitution. These facts are not in question. Mr. Khaoya has, in my view, illustrated that there is a nexus between him and the organization. I am therefore unable to agree with Mr. Kituyi that John Wekesa Khaoya lacks the locus standi to institute Petition No. 2 “A” of 2014. The cases of **FREE PENTECOSTAL FELLOWSHIP IN KENYA (Supra)** and **KENYA AUTO BAZZAAR ASSOCIATION (Supra)** relied on by the 1st and 4th Respondent are not applicable in that those cases concerned the application of normal civil litigation under the Societies Act, Cap 108 and the Civil Procedure Act and Rules which is not the case here. In the instant case, this is a Constitutional Petition in which the Constitution itself has relaxed the *locus standi* rule. I accordingly dismiss the Respondents’ objection.”

In *Wycliff Indalu Adieno v Attorney General & 2 others [2014] eKLR, H.C at Nairobi Petition No. 314 of 2015*, the learned judge Odunga J held as follows;

“Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the relief for conservatory order thereunder is, prima facie, only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened. From the petition, the Petitioner’s locus is derived from the provisions of Article 258 of the Constitution which provides for the right to institute court proceedings, where it is alleged that the Constitution has been contravened, or is threatened with

contravention. A reading of the petition as a whole seems to indicate that the Petitioner's grievances stem from the allegation that the *Nairobi City County Betting, Lotteries and Gaming Act, 2014* is unconstitutional and is premature. There is no express allegation that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

Therefore an applicant for conservatory order under Article 23(2)(c) of the Constitution ought to bring himself or herself within the provisions of Article 22 of the Constitution by pleading and establishing on a prima facie basis that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

In view of the foregoing it is apparently clear that both the Petitioners and the members of Sengwer community were covered by the said orders. I understand the petitioners to be acting as members of the Sengwer community and therefore nothing stops the petitioners from filing a petition on behalf of the said Community. Even if they were not members of the Sengwer community they can still file the petition in the interest of the community as the terms "*members of*" and in the "*interest of*" are used in Article 22 of the constitution of Kenya disjunctively and not conjunctively. Though the petitioner seeks relief on behalf of the whole community, its introduction refers to only listed members on an annexed schedule that I could not find on the court file. On this issue, I do find that this is a representative suit.

B) WHETHER THE APPLICANT HAS COMPLIED WITH ORDER 52 OF THE SUPREME COURT OF ENGLAND RULES OF PROCEDURE (COMPETENCE OF THE APPLICATION)

On this issue as noted earlier the instant application is brought pursuant to the provisions of the Judicature Act, Cap 8 Laws of Kenya, Civil Procedure Rules 2010 and Supreme Court of England Practice and Rules (Order 52). The 2nd and 3rd Respondents in their grounds of opposition have stated that the instant application is defective and incompetent. To this end their counsel relied on a number of case law cited above. It is important to note that the procedure for commencing contempt proceedings is well established under Order 52 of the Supreme Court of England Practice Rules. In *Republic vs. County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011]eKLR, H.C at Nakuru Judicial Review Case No. 74 of 2010* supra, the learned judge Ouko J. elaborated on the procedure to be followed for instituting contempt of court proceedings as follows;

"The procedure as it is today after permission has been granted may be summarized as follows:

- i) Unless within 14 days after permission was granted the claim form (the substantive application) is made, the permission shall lapse (Order 52 Rule 3 (2)
- ii) The substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor. (Rule 3 (3), unless the Court or Judge has dispensed with service or if it or he thinks it just to do so (Rule 3 (4)
- iii) Under Rule 5 the High Court and the Court of Appeal may of its own motion make an order of committal against a person guilty of contempt of court.
- iv) The court hearing an application for an order of committal must do so, as a general rule, in public, except where the application relates to, adoption, guardianship, custody and maintenance of an infant, or where proceedings relate to a person suffering from a mental disorder, or where it appears to the court that in the interest of justice or for reasons of national security the application should be heard in private.
- v) No grounds shall be relied on at the hearing of an application for contempt, except those set out in the statement, or in the claim form or application notice.

vi If the contemnor wishes to give oral evidence on his own behalf, he shall be entitled to do so....”

In Ex-Parte Peter Nyamu Karaguri Muhuri Karaguri V Attorney General Of Kenya & 5 Others[2013]eKLR, H.C at Nairobi Civil Miscellaneous Application 405 of 2007, supra, the learned judge Odunga J. observed as follows;

“Under both Section 5 of the Judicature Act and Order 52 of the Rules of the Supreme Court of England, the applicant must first seek leave to institute the proceedings and once leave is granted under rule 2, the substantive application is thereby made and it is required under Order 52 rule 3(3) that it should be served personally on the person sought to be committed. Under Order 52 Rule 3(2) of the Rules of the Supreme Court of England, an application for contempt of court must be filed within 14 days from the date when permission to apply for the same was granted and any application filed outside the prescribed time without any extension being sought renders the order made pursuant to the said application a nullity having been made without jurisdiction since the subrule states that “unless within 14 days after such permission was granted the claim form is issued, the permission shall lapse”. See Andrew Kamau Mucuha vs. The Ripples Limited Civil Appeal No. 19 of 1998 [2001] KLR 75.

From the foregoing it is clear that a party who intends to institute contempt of court proceedings ought to prepare a notice of intention to institute contempt of court proceedings. That notice is to be accompanied by copies of the statement and affidavit setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought and an affidavit verifying the facts relied on. Those documents are required to be served on the Attorney General at least one day before the application for leave is made. In other words the documents being served on the Attorney General are to be so served before the same are filed in Court to notify the Attorney General of the processes that the applicant intends to institute.

It is clear that the foregoing procedure was never adhered to by the applicant herein and that it renders the proceedings for contempt incompetent.”

In Joseph Peter Gichoya Mbogo C/O Stephen Macharia Kimani Adv V Patrick Dennis Ok’eeffee & another [2006] eKLR H.C at Malindi Civil Case No. 17 of 2005 supra, the learned judge Ouko J. delivered himself as follows;

“Order 52 rule 3 (3) of the Rules of the Supreme Court of England makes it mandatory that the Notice of Motion accompanied by a copy of the statement and affidavit in support of the application for leave must be served personally on the person sought to be committed. Service was not proper. **For all these reasons I am satisfied that contempt has not been proved against any of the defendants.”**

In National Bank of Kenya Ltd v County Council Of Olekejuado & 2 others [2013] eKLR, H.C at Machakos Civil Miscellaneous (JR) No. 5 of 2012, supra, the learned judge Mutende J. observed as follows;

“It is also a requirement that an applicant gives a notice of the application for leave to the Registrar. Also required to be lodged are copies of the statement and affidavit. This must be done a day preceding the date of the application. It is settled that the Registrar’s Office is equated to the Crown Office and in Kenya the attorney General’s Office. This was held in **Republic versus the Attorney General Exparte Bindi A. Gadia Kisumu HCMISC No. 124 of 2005 where Mwera,J** (as he then was) stated thus:

“... The application for leave which should precede the substantive motion fell foul of the law when the application was not notified to the Registrar a day

before its hearing. All above proceeds on the basis that the Divisional Court in England has its counterpart in the High Court here while the Crown Office should be equated to the Registrar's office.... Failure to do so what the law requires cannot be described as slight procedural mis-steps. There were/are fundamental in the sense that committal proceedings are about a person's liberty."

9. This issue was also considered in *Petra Juliane Muller versus Saidha Kwa Muyo Foundation (NGO) Civil Appeal No. 51 of 2006, (Malindi) were Omondi,J, stated thus:-*

"The equivalent of the Crown Office in the Kenyan set up would be the Attorney General's Office."

Odunga, J also concurred that the Crown Office in this country is the Attorney General's Office (see John Mugo Gachuki (*Supra*))

I am also of the view that the Crown Office in this country is indeed the Attorney General's Office. This being the case, it was a requirement that the *ex parte* applicant serves a notice to the Attorney General. There is nothing to show that the notice of intention to commence proceedings was served on the Attorney General's Office or was intended to be served on that office. Similarly there is nothing to suggest that the Attorney General was served with any statement and affidavit prior to the application for leave being made. It has been stated that contempt of court proceedings are special proceedings that are quasi – criminal in nature that is why the law must be applied to the letter. The requirement in this case was flouted.

On the issue of Notice to the Attorney General I do differ with the honourable judges and find that though the act of serving a Notice to the Attorney General in compliance with **Order 52 Of The Rules Of Supreme Court Of England Rules Of Procedure appears Mandatory**, it is not an **imperative** requirement that notice ought to be served especially where the person alleged to be in contempt is a state organ organ advised by the Attorney General. Moreover the honourable Attorney General is a party in the proceedings.

Justice G.P. Singh in his treatise known as Principles of Statutory Interpretation Tenth Edition (2006) at page 378 says:

"The use of the word "shall" raises a presumption that a particular provision is imperative: but this prima facie inference may be rebutted by other consideration such as object and scope of the enactment and the consequences flowing from such"

This court finds that the requirement to serve the Attorney General a notice was intended to inform him of the impending quasi criminal proceedings to enable him chose to attend or not. In this matter the Attorney General is already a party. I do hold that the use of the word shall in directing the party making the application to serve the notice is directory and not imperative. Moreover this argument by Professor Sifuna must fail also because **Article 159 of the Constitution of Kenya** guides this court to consider substantive justice and not technical justice by putting undue regard on procedural technicalities.

C) WAS THE ORDER WAS BREACHED AND IF YES WHO BREACHED IT? AND WHAT IS THE PUNISHMENT

This court should first determine whether the respondents were aware of the order. On the 2nd of April 2013 Mr. Vincent O. Ogutu of post office Boix 1587 Eldoret in the Republic of Kenya a process server received the copies of this order issued on 26/3/2013, the application dated 25/3/2013 and fixed for hearing on 8/4/2013 from M/s Singoei and Murkomen & Co advocates and traveled to the Kapsowar district and proceeded to the office of Zonal Forest Manager and met the said Zonal Manager a Mr. Nyaswabo and served him with the papers including the order. He declined to sign but he directed him to serve the head office in Nairobi.

I have perused the affidavits of Luka Toroitich Kiraton and the other deponents who state that in September 2013 they were told by the county commissioner to open Bank accounts for some money to be deposited. They opened bank accounts and received Kshs.400,000/= .one quarter of the Sengwer Community received the money but other have not received. They learnt later that the money was a consideration for the community to leave the forest. The gist of the supporting affidavits is that the petitioners were evicted forcefully from the forest despite the court order.

The 1st and 4th respondents on the other hand through **Sammy K. Chendayo** SSP stated that they were unaware of the court order dated 25/3/2013 by this court and were aware of the court order issued on 18/1/2014 which they obeyed. He states that the forest dwellers left Embobut forest on their own volition and that the Kenya Forest Service entered the said forest only after they had left. The National Police only entered the forest for purposes of over seeing the maintenance of law and order and security as well as monitoring and surveillance as to whether forest dwellers had already moved out by 6/1/2014.

The replying affidavit by **Solomon Mibey** was filed on 5/3/2014. He denies Kenya Forest Service ever evicting the petitioners and states that the occupants of Embobut forest left the forest on their own volition after compensation.

Mr. Arthur Osinya, the County Commissioner Marakwet also states that the Embobut forest residents left on their own volition.

I have looked at the status report and do find that the same was prepared on the basis of this courts order made on 18/1/2014. The report dated 10/2/2014 refers to the task force formed in 2009. The said task force identified 2874 person living in the forest who were to be paid Ksh.400,000 each in order to leave the forest. The president launched the payment on 1st October 2013 at Tangul primary school play ground within Kapyego administrative division. After receiving the cash the squatters left the forest voluntarily. On the 8/1/2014 the Kenya Forest Service moved in the officers who camped at Maron. In essence the status report concludes that the petitioners moved out voluntarily and no eviction happened.

The standard of proof in contempt matters is slightly above “balance of probabilities” but lower than “beyond reasonable doubt”. The petitioners in this matter appear to have received some money but they claim that they thought that the Government was compensating them for past atrocities whilst the government states that the petitioners were being paid as agreed earlier in order to vacate the forest.

Though it was prudent for the respondents to come back to court before taking any action in attempting to settle the matter, the parties herein engaged in some negotiation and finally reached a vague agreement. Now each party has its own version of the agreement.

In view of the authorities with regard to contempt proceedings, it is my finding that the instant application seeking to commit respondents for contempt of court is incompetent due to reasons that the alleged contemnors have not been expressly, specifically, precisely and personally identified. The Petitioners/Applicant on 12th February 2014, *vide* the application dated 12th February 2014 sought leave to institute contempt proceedings against the Respondents. The said application sought the following substantive order;

“The Petitioners/Applicants be granted leave to file contempt proceedings against the Respondents herein”

In granting the said application the honourable judge Munyao J. directed as follows

“The Petitioners/Applicants be and are hereby granted leave to file contempt proceedings against the Respondents herein. The contempt proceedings be filed within fourteen days.”

It is apparently clear from the foregoing order and the instant Notice of Motion dated 19th day of February 2014, the Respondents being cited for contempt of court are The Honourable Attorney General, The Kenya Forest Service, The Kenya Forest Service Zonal Manager, Marakwet East District, the District

Commissioner, Marakwet East District and the National Land Commission. Be that as it may in the said Notice of Motion dated 19th February 2014, the Petitioners are seeking the following substantive prayers;

a)That this Honourable Court be pleased to make a declaration of willful disobedience of a Lawful Court Order against such of the Respondents or any other person found after the hearing of this application to have been guilty of such disobedience of any of the orders issued by this Court.

b)That the Respondents or respective officers or any such person as shall at the hearing be deemed to have been aware of the orders and whoever disobeyed any such order be committed to civil jail for six months or such other period as the court may order for contempt of court.

c)That the Respondents or such of them as shall be found guilty of disobeying Court Orders together with any other person found to have been aware of the Court Order and whoever disobeyed any such court orders be condemned to pay such fine as shall be commensurate or reasonable proportional to punishment for disobedience of the Court Orders

d)Such other or further orders as the court may deem appropriate to grant.

It is not clear as to whether the Petitioners/Applicants are citing the afforested Respondents or their subordinate officers. I find the foregoing quite ambiguous given the fact that contempt proceedings are criminal in nature which must be precise, specific and targeted to particular person(s) other than generalizing everyone and purporting to bring any unnamed person(s) on board. This is so because criminal liability is a personal liability and cannot be generalized. In their supporting affidavit the Petitioners/Applicants through David Yator Kiptum has deposed that the respondents have proceeded to commit various acts of contempt as outlined under para 13 of the supporting affidavit.

The foregoing notwithstanding, the Petitioners on 18th January, 2014 moved the honourable court vide the application dated 17th January 2014 and obtained the orders directing that; the Elgeyo Marakwet County Police Commandant, Officer Commanding Administrator Police in Elgeyo Marakwet or Persons exercising the command or authority vested upon those officers to ensure observance and enforcement of the court order given on 25th March 2013 and to stop the respondents either by themselves or through their agents from acting in contravention of the said court order. As a result of the foregoing Court Orders the Petitioners in their supporting affidavit have deposed that in a similar active, willfully and derogatory manner the said officers disobeyed the court orders thereby committing further acts of contempt. They have outlined six acts of contempts.

In view of the foregoing it is apparently not clear on who is being cited for contempt. In line of the procedure outlined above for commencing contempt proceedings, it is a requirement that the applicant must name, describe and give particulars of the contemnor and more so be served in person with the Notice of Motion. In the case of *Ex-Parte Peter Nyamu Karaguri Muhuri Karaguri V Attorney General Of Kenya & 5 Others[2013]eKLR, H.C at Nairobi Civil Miscellaneous Application 405 of 2007.* supra, the leaned judge Odunga J. observed that;

“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.”

In the case before the Honourable Court, it is therefore difficult to ascertain whether the Petitioners citing the Attorney General, (1st Respondent), The Kenya Forest Service, (2nd Respondent), The Kenya Forest Service Zonal Manager, (Marakwet East District) (3rd Respondent), The District Commissioner (Marakwet East District) (4th Respondent), The Land Commission (5th Respondent), or The Elgeyo/Marakwet County Police Commandant for contempt. The question that follows is whether the foregoing were personally served? This leads us to the second reason as to why the instant application is

incompetent thus Lack of Personal Service of the Instant Notice of Motion on the Alleged Contemnors.

Order 52 Rule 3(3) of the Supreme Court of England Practice Rules requires that the substantive application, accompanied by a copy of the statement and affidavit in support of the application for permission must be served personally on the contemnor. (*See Republic vs. County Council of Nakuru Ex-Parte Edward Alera t/a Genesis Reliable Equipment & 2 Others [2011]eKLR, H.C at Nakuru Judicial Review Case No. 74 of 2010 supra*). As noted above the Petitioners have cited Respondents, Five of them and the The Elgeyo/Marakwet County Police Commandant as having disobeyed the various court orders issued herein. It follows therefore that they ought to have been served personally with the instant Notice of Motion, in my view. For instance how could the Honourable Court issue a committal order against the said police officers who are neither identified and named nor enjoined to the proceedings and served with the application for contempt. **In the case of *Emma Wanjiku Ndungu V Francis Njoroge Kamau & 4 Others[2012]eKLR, H.C at Nairobi, Succession Cause 799 of 2009*** the learned judge Njagi J. while declining to uphold contempt proceedings noted that the applicant had failed to meticulously observe the procedure for committal proceedings. The learned judge opined as follows;

“For the above reasons, I am afraid that the Respondents cannot be liable for committal to a civil jail because the laid down procedure for committal for contempt was not meticulously observed. It may well be that this could be perceived as lenience on the part of the court while, unfortunately, it is a procedural lapse which is probably meant to safeguard the liberty of a citizen. It has not escaped the attention of this court that in the face of these stringent procedures, in the English case of *MARIA ANNIE DAVIES [1989] 21 QBD 236 at 239*, it was observed 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 not other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.”

Section 5 of the Judicature Act provides that 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. 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. While Order 40 Rules (2) & (3) of the Civil Procedure Rules 2010 provides as follows;

2. (1) In any suit for restraining the defendant from committing a breach of contract or other injury of any kind, whether compensation is claimed in the suit or not, the plaintiff may, at any time after the commencement of the suit, and either before or after judgment, apply to the court for a temporary injunction to restrain the defendant from committing the breach of contract or injury complained of, or any injury of a like kind arising out of the same contract or relating to the same property or right.

(2) The court may by order grant such injunction on such terms as to an inquiry as to damages, the duration of the injunction, keeping an account, giving security or otherwise, as the court deems fit.

3. (1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and

shall pay the balance, if any, to the party entitled thereto.

Contempt of court in this context may be defined in terms of Civil Contempt. In the premises, according to the Halsbury's Laws of England, civil contempt has been described as follows;

“...disobedience to process is a civil contempt of court to refuse or neglect to do an act required by a judge or order of the court within the time specified in the judgment order requiring a person to abstain from doing a specified act, or to act in breach of an undertaking given to the court by a person, on the faith of which the court sanctions a particular course of action or inaction...” (See *Halsbury's Laws of England, 4th Edition (9th Re-Issue)*, Pg 33, para 52.)

While Black's Law Dictionary defines contempt as follows;

“The failure to obey a court order that was issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature. The usual sanction is to confine the contemnor until he or she complies with the court order. (See *Blacks Law Dictionary, 7th Edition at pg 313*)

In *Hadkinson Vs. Hadkinson (1952) 2 All ER 567 at pg 569* it was held as follows;

“A party who knows of an order, whether null and void, 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 and void, 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 and 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...”

In *Mutika vs. Baharini Farm Ltd [1985] KLR 227* at pg 230 and 233 the learned judges Hancox, Nyarangi JJA and Gachuhi Ag JA,

“The principle propounded in *re Maria Annie Davis [1889] 21 QBD 236*, and 239, that

'Recourse ought not be had to process of contempt in aid of a civil remedy where there is any other method of doing justice. The observations of the latter Master of the Rolls in the case of *Re Clement* seem much in point: 'It seems to me that this jurisdiction of committing for contempt being practically arbitrary and unlimited, should be most jealously and carefully watched, and exercised, if I am say so, with the greatest reluctance and the greatest anxiety on the part of judges to see whether there is not other made which is not open to the objection of arbitrariness, and which can be brought to bear upon the subject. I say that a judge should be most careful to see that the cause cannot be mode of dealing with persons brought before him. On accusations of contempt should be adopted. I have myself had on many occasions to consider this jurisdiction, and I have always thought that, necessary though it be, it is necessary only in the sense in which extreme measures are sometimes necessary to preserve men's rights, that is, if no other pertinent remedy can be found. Probably that will be discovered after consideration to the true measure of the exercise of the jurisdiction' must be born in mind... we draw attention to the following passage from the 3rd Edition of *Oswald on Contempt at pg 16*

The court, however, has power to retrain by injunction threatened contempts. It is competent for the court where a contempt is threatened or has been committed, and on application to commit, to take the lenient course of granting an injunction instead of making an order for committal or sequestration, which the offender is a party to the proceedings or not”

In *Teachers Service Commission V Kenya National Union Of Teachers & 2 Others [2013] eKLR 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.”

In *Shah & Another t/a Lento Agencies vs. National Industrial Credit Bank Ltd, [2005] 1 KLR 300*, the learned judge Njagi J. relied on various English authorities and delivered himself extensively. On relying on the decision in *Hadkison vs Hadkinson*, supra, the learned judge at pg 305 observed as follows;

“Pausing there for a while, it seems that unless and until a Court order is discharged, it ought to be obeyed. A question that immediately arises is this-what happens between the making of the orders and the date of the discharge? Simple logic dictates that as long as the orders are not discharged, they are valid. And since they are valid, they should be obeyed., in observance,not in breach. That being the case, it seems to me that the only way in which a litigant can obtain a reprieve from obeying a court order before it is discharged is by applying for and obtaining a temporary stay. As long as the order is not stayed, and is not yet discharged, then a litigant who elects to disobey it does so at the pain of committing a contempt of court”.

The Learned Judge at pg 306 further observed as follows;

“While acknowledging that the general principle governing matters of contempt of court is that set out in *Gordon V. Gordon* (supra) , the court in *HADKINSON v. HADKINSON* (supra) further said that there exist exceptions to that general principle. Continuing with his speech at p.570, Romer L.J. said-

“... One of such exceptions is that a person can apply for the purpose of purging his contempt, and another is that he can appeal with a view to setting aside the order on which his alleged contempt is founded...” The defendant does not come within any of these exceptions. However, after summarising the history of the rule through the ecclesiastical courts to the modern times, Denning, L.J., said, at pp 574-575-

“...It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance... I am of opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed.”

The Learned Judge at pg 307 continued and reiterated as follows;

“At the risk of repeating myself, the learned Lord Justice made it clear that it is not every matter of defence which entitles a person in contempt to be heard. He said at p.705- “I do not for one moment suggest that it is every matter of defence which entitles a person in contempt to be heard. For instance, if an order has been made in the exercise of the discretion of the court, and someone who thinks himself oppressed by that order appeals, saying that the court has exercised its discretion wrongly, that person if he is in contempt, cannot be heard to say anything of the sort until he has purged its contempt. *Gardstin v. Gardstin* [1865] 4 SW. & Tr. 73, is an instance of that kind.

If this proposition is anything to go by, and if the orders complained of were made, as I

think they were, in exercise of the court's discretion, then the defendant should not be heard to complain. His Lordship then continued "But when you come to an order which it is suggested may have been made without jurisdiction, if, upon looking at the order one can see that that is the ground of the appeal, it seems to me that such a case has always been treated as one in which the court will entertain the objection to the order, though the person making the objection is in contempt..."

In the case of *Bell vs. Tuhoy & Another (2002) 3 All ER 975 Pg 981, para 22*, the honourable learned judge Neuberger. J opined as follows;

"That an order made by a judge of unlimited jurisdiction, for instance in the High Court must be obeyed, and failure to observe it can amount to contempt of court, however irregular it might be unless and until it is reversed or set aside". (see *Bell vs. Tuhoy & Another* See also *Issacs vs. Robertson (1984) 3 All ER 140 at 142-143, (1985) AC 97 at 101-103*)

In *Africa Management Communication International Limited v Joseph Mathenge Mugo & another [2013] eKLR, H.C at Nairobi, Milimani Law Courts, Civil Case No. 242 Of 2013*, the learned judge Mabeya J.

"I have considered the Affidavits on record, the submissions of counsel and authorities relied on. I propose first to deal with the prayer for contempt and committal. Black's Law Dictionary (Ninth Edition) defines contempt of court as:-

"Conduct that defies the authority or dignity of a court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment."

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*).

...

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.”

In *Safepak Limited V Malplast Industries Limited* [2008] eKLR, H.C At Nairobi Civil Suit No. 365 of 2007, the learned judge P.M Mwilu stated as follows;

“The burden of proof is on the Applicant to clearly show that the Respondent was in contempt. And that is the position in RE BRAMBLEVALE LTD 1970] Ch.128 at page 137 where Lord Denning MR. said.

“A contempt of court is an offence of a Criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that when a man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given then his lies can be thrown into the scale against him. But there must be some other evidence.”

In our Court of Appeal Civil Application No.39/1990 REFRIGERATOR & KITCHEN UTENSIL LIMITED VS- GULABCHAND POPATLAL SHAH & OTHERS approving the standard of proof in contempt cases as set out in the case of GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995 GATHARIA MITIKA & others –vs- BAHARINI FARM LIMITED CIVIL APP NO. 24/1995. Their Lordships held that in cases of alleged, contempt, the breach for which the alleged contemnor is cited must not only be precisely defined but proven to a standard which is higher than proof on a balance of probabilities but not as high as proof beyond reasonable doubt. The charge must be proved beyond peradventure”

This leads us to the Interpretation of the third limb of the said order which states that;

“3. That this Order Shall Remain in Force until 8th April 2013 when the application will be heard inter-partes.”

The said orders were to be in force until 8th April 2013 when the Petition was supposed to be heard interparte. Apparently, according to the Court record, on 8th Nothing transpired in court. It was until 11th April 2013, when the matter was placed before the Deputy Registrar who directed that the matter be placed before the honorable judge for directions. On the said 11th April 2013, the Hon. Judge Ochieng J. gave the following Orders;

“1) There is no application before me, which I can certify as urgent. A certificate of Urgent cannot move the court, of itself.

2. Nonetheless, the application dated 22/3/13 is fixed for *inter-partes* hearing on 17/4/2013. And until that date (17/4/13) the Conservatory orders issued on 25th/3/13 shall remain in force.”

My understanding of the same is that the said orders were meant to extend the ones initially given on 25th March 2013 to 17/04/2013. It follows thereafter that the same were continuously extended. This is so because, when this matter came before the Hon Judge Ngenye J. on 17/04/2013, the said conservatory orders were extended to 22/5/2013. On 22/5/2013, the said Conservatory or rather Interim orders were once again extended to 5/11/2013. On 5/11/2013, the Interim orders were again extended to 19/11/2013. Apparently on 19/11/2013, the matters did not proceed but the court failed to extend the interim orders. The honourable judge Ngenye-Macharia J. directed that the matter be placed before the Environment and Land Court (ELC) for directions on 20/11/2013. The foregoing notwithstanding, on 20/11/2013, when this matter was placed before Hon. Judge Sila Munyao J. in the Environment & Land Court, he adjourned the matter and directed that the directions be given on 6/2/2014 on how to proceed with the application and consequently the Interim orders herein were extended to the said 6/2/2014.

However on 18/1/2014, the Petitioners counsel filed an application seeking the enforcement and the compliance of the said interim orders. The said application dated 18/1/2014 was heard ex-parte. On granting the said application the learned judge ordered, as noted earlier, that the Elgeyo Marakwet County Police Commandant, Officer Commanding Administration Police in Elgeyo Marakwet or Persons exercising the command or authority vested upon those officers to ensure observance and enforcement of the courts orders given on 25th March 2013 and to stop the respondents either by themselves or through their agents from acting in contravention of the said court order.

On 6/2/2014, the learned judge Hon. Ochieng J. once again extended the interim orders herein to 20/2/2014, when the Petition would be heard. However on 12/2/2014 the Petitioners filed an application dated 12/2/2014 seeking leave to commence the contempt proceedings against the Respondent. The said leave was sought Ex-parte and the same was granted. This led to the instant application which was filed on 19th February 2014.

In view of the foregoing unfolding of the events, it is quite clear that the orders in question were not permanent, they were only interim being extended from time to time. According to the instant application it is apparently clear that there are only two sets of orders that were duly extracted and served. The first set of order to be extracted and served are the conservatory orders that were given on 25th March 2013 and issued on 26th March 2013 by the honourable court.

Vincent O. Ogutu the process sever has sworn two affidavits with regard to the service herein. The first Affidavit is dated 3rd April 2013. He deposes as follows;

1. ...
2. **“That on 2nd April 2013, I received copies of Court Order issued on 26th March 2013, Application dated 25th March 2013 and fixed for hearing on 8th April 2013 plus copies of Notice of Motion dated 25th March 2013 from M/S Sing'oei and Murkomen & Co. Advocates with instructions to serve the same upon The Zonal Forest Manager, Marakwet District.**
3. **That on the same day I traveled to Kapsowar District and Alighted at he Bus Stop and I proceeded to the office of Zonal Forest Manager and on arrival I met with Mr. Zonal Manager known as Mr. Nyaswabo and after my introduction and purpose of my visit he also did the same and he perused the said Court Order, Application and Notice of Motion and he acknowledged service but he declined to sign saying that I should go and serve the head office in Nairobi.**
4. **That Mr. Nyaswabo who is Zonal Manager became known to me at the time of effecting service at 3.45**
5. **That I hereby return a duly served Court Order, Application and Notice of Motion.**
6. ...”

The second Affidavit sworn by the same process server Vincent O. Ogutu is the one dated 6th April 2013. He swears as follows;

- “1 ...
- 2 **That on 2nd April 2013, I received copies of Court Order issued on 26th March 2013, Application dated 25th March 2013 and fixed for hearing on 8th April 2013 plus copies of Notice of Motion dated 25th March 2013 from M/S Sing'oei and Murkomen & Co. Advocates with instructions to serve the same upon The District Commissioner Marakwet East District.**

3 That on 5th April 2013 I traveled to Kapsowar District and alighted at the Bus stop and I took another motor vehicle Chesoi township and alighted at the bus stop and I proceeded to District office and on arrival I met with secretary known as Rose and after my introduction and purpose of my visit, she also did the same and she perused the said Court order, Application and Notice of motion and she acknowledged service on behalf of D.C Mr. Joseph Kisangau by date stamping on the face of my copy.

4. That Rose became known to me at the time of effecting service at 12.00 pm.”

5. ...”

In view of the foregoing affidavits sworn by the process server Vincent O. Ogotu it is apparently clear that the Orders of the Court given on 25th March 2013 were apparently served upon two individuals. One a Mr. Nyaswabo, who, according to the said process server is the Kapsowar Zonal District Manager, Kenya Forest Services and Two, One Rose, who according to the said process server received the said order on behalf of Kapsowar District Commissioner, Mr. Joseph Kisangau. In the instant application, a Mr. Nyaswabo and a Mr. Joseph Kisangau, have neither been cited nor served with the instant application. Be that as it may there is no evidence to the effect that Mr. Joseph Kisangau was personally served with the said court order given on 25th March 2013.

The foregoing notwithstanding, the said orders given on 25th March 2013, were just but interim orders which were to be in force until 8th April 2013 when the Petition herein would be heard interpartes. From the said date, 8th April 2013, the said interim orders were extended severally, precisely seven times that is before the application for leave to institute contempt proceedings was filed on 12/2/2014. Note that on 8th April 2013 the said orders were not extended until 11/04/13 when they were extended to 17/04/13, 22/05/13, 5/11/13, to 19/11/13 whereon the court did not extend the same until 20/11/13 when they were extended to 6/2/14. On 6/2/2014, they were extended to 20/2/2014. However, before the Petition was heard on 20/2/2014, the Instant application was filed.

In the instant application the orders given on 25th March 2013, were extended on several occasions but were never extracted and served upon the parties concerned. An interim order on its extension, must be extracted and personally served upon the party concern, in my view.

The second set of Orders herein were obtained on the 18th day 2014 the Petitioners obtained the second set of court orders these were Enforcement and Compliance orders with regard to safeguarding the said interim orders obtained on 25th March 2013.

The said orders once again were served. In his Affidavit of service Joseph Omalla Achode swears as follows;

“...

1. That on 21st January, 2014, I received a court order given and issued on 18th day of January, 2014 attached to another court order dated and issued on the 26th day of March, 2013 from M/S Gumbo & Associates Advocates with instructions to serve the same upon ELGEYO/MARAKWET COUNTY POLICE COMMANDANT.

...

4. That upon entry to the same, I found a gentleman who ushered me in and to whom I introduced myself to and the purpose of my visit.

5. That he in turn introduced himself to me as Inspector Mwakiro, the Elgeyo/Marakwet County Police Commandant and asked how he would help me.

6. That I then served him with the aforestated court order attached to the other for his

attention and also for hearing on 6th February, 2014.

7. That upon perusal on the said orders, he called his Officer Commanding Police Department on his cell phone in my presence who confirmed to him that he was aware of the issues contained in the order and later accepted service by retaining his copy (though declined to endorse on my copy) claiming that he would present his report on the issue in court on 6th February, 2014 as per the order.

8. That the Elgeyo/Marakwet County Commandant is a stout dark man who known to me at the time of service herein.

9. That I served at 12.45 pm.

In view of the foregoing affidavit the gentleman by the name and title Inspector Mwakiro, who is alleged to be the Elgeyo/Marakwet County Police Commandant was personally served with the Court Order given on 18th January 2014. Similarly the said gentle man has not been personally cited for contempt neither is he party to the petition herein. Be that as it may an Officer by the name Patrick Mwakio SSP, who is the appointed County Police Commandant, Elgeyo Marakwet County under the command of the Inspector General of Police in the National Service, through the Office of the Attorney General, the 1st Respondent and the 4th Respondent herein *vide* his Replying Affidavit dated 20th March 2014 denies being in contempt of any court order. In his replying Affidavit he swears as follows;

“13. That I confirm we that we as the Kenya Police Service, Elgeyo Marakwet County never been served with the Court Order issued by the Honourable Court on 25.3.2013

14. That I was personally not served with any Court Order on 21.1.2014 or on any other date as alleged by Joseph Omalla Achode; the process server in the affidavit of service sworn on 22-1-2014 and filed on 23-1-2014.

15. That I further confirm to the Honourable Court that I am not Inspector Mwakiro as alleged in the affidavit of Joseph Omalla Achode but I am Patrick Mwakio SSP(Senior Supernatant of Police).

The foregoing deponents were not rebutted by the Petitioners/Applicants. It follows therefore that the one Inspector Mwakiro is not the Elgeyo/Marakwet County Police Commandant that was directed by the honourable court on 18th January 2014, to ensure enforcement and compliance of the court orders issued on 25th march 2013.

On the other hand the 2nd Replying Affidavit filed by the 1st and 4th Respondent, was sworn by one Sammy K. Chandago who is the appointed County Administration Police Commandant, Elgeyo Marakwet County under the command of the Inspector General of Police in the National Police Service, swears as follows;

“24. That however, in the month of December we did not enter the forest when the former forest dwellers started voluntarily moving out as it was not necessary, the only exception being the officers within the above named three Administration Police Posts who were engaged in the normal daily routine patrols in addition to Kenya Police Officers who also conduct normal patrols.

25. That I confirm and I am aware that the Kenya Forest Services had re-entered the forest in an open operation named OPERTION OKOA EMBOBUT on 8-12014, after the last group of squatters having voluntarily left following the receipt of the ex-gratia payments.

26. That this was prior to the service of the Court Order issued on 18/1/2014.”

Apparently Sammy Chandago was neither cited for Contempt nor served with the instant application. However his affidavit is on behalf of the Attorney General, 1st Respondent and The District Commissioner Marakwet East District, 4th Respondent. Sammy Chandago admits being aware of the said orders issued on 18/1/2014 but he notes that the 'Operation Okoa Embobut' had been carried out long before the service of the Orders of 18/1/2014.

Having said the above the Extraction and personal service of court order are very crucial elements in so far as the contempt proceedings are concerned.

In Emma Wanjiku Ndungu V Francis Njoroge Kamau & 4 Others[2012]eKLR, H.C at Nairobi, Succession Cause 799 of 2009, the learned judge Njagi J. opined as follows;

“Contempt proceedings are a delicate procedure which is jealously guarded. The consequences of contempt being penal, an applicant must show that he himself has complied with the procedural requirements. If such requirements are not strictly adhere to, the court will not grant a committal order for contempt. One of the requirements is that mere knowledge of all terms and directions of the court is not enough for the purposes of holding a party liable for contempt. It is not enough that those accused of contempt were privy to the orders which they are accused of breaching. It must be shown further that the alleged contemnors had been served with copies of the court order which carried a penal notice. In the case of NYAMODI OCHIENG NYAMOGO & ANOR v. KENYAPOSTS AND TELECOMMUNICATIONS CORPORATION, Civil Application No. Nai 264 of 1993, it was held that mere knowledge of all the terms and directions of the court order is not enough for the purposes of contempt. This view had been previously held in the case of Jacob ZEDEKIAH OCHINO & ANOR v GEORGE AURA OKOMBO & OTHERS Civil Appeal No. 36 of 1989, in which it was held that no order requiring a person to do or refrain from doing an 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 the instant case, it has not been demonstrated that the above conditions were satisfied as no evidence has been tendered of any penal notice having been served on the alleged contemnors. Secondly, such notice should be served on the contemnors personally and not through their advocate(s). It is unfortunate that contemnors should escape liability for their transgressions on account of procedural lapses. However, committal proceedings being quasi criminal in nature, they attract more stringent requirements than the ordinary civil process.

For the above reasons, I do find that the Respondents cannot be liable for committal to a civil jail because the laid down procedure for committal for contempt was not meticulously observed. It may well be that this could be perceived as lenience on the part of the court while, unfortunately, it is a procedural lapse which is probably meant to safeguard the liberty of a citizen. It has not escaped the attention of this court that in the face of these stringent procedures, in the English case of MARIA ANNIE DAVIES [1989] 21 QBD 236 at 239, it was observed 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 not other mode which is open to the objection of arbitrariness, and which can be brought to bear upon the subject.”

It follows therefore that indeed the said conservatory orders were rightly in force due to their subsequent extension. But then the Petitioners slept on them and never took the initiative of extracting and ensuring the concerned persons were properly and duly served.

It is apparently clear that despite the conservatory orders being in force, the 1st, 2nd, 3rd and 4th Respondents may have interfered with the members of the Sengwer community leading to exodus from the Embobut forest. This is in public domain, and the replying affidavits herein demonstrate that some of

them were paid ex-gratia of which they voluntarily moved away. It is also evident that some of the members of the Sengwer community were evicted and or vacated at the expense of the conservatory orders in place. This was not to happen given the fact that status quo was to be maintained pending this petition in court. Having said that, the instant Application has not set out this matter in a competent manner that would allow the grant of orders sought, in my view. Beginning with the instant Notice of the Motion did not adequately cite the contemnor(s). It is punctuated with so many generalities. Contempt of Court proceedings being quasi criminal in nature ought to be precise, express, and direct to the individual(s) who are and or to be charged. Secondly the said Notice of Motion having failed to cite individuals to be punished for contempt was not served on the alleged contemnors. And thirdly, the two sets of orders obtained herein were not sufficiently served upon the Respondents and any other officers that are alleged to have disobeyed the same. The application for the above reasons ought to fail and is therefore dismissed with no order as to costs.

DATED AND DELIVERED AT ELDORET THIS 18TH DAY OF FEBRUARY 2015

ANTONY OMBWAYO

JUDGE