REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL SUIT NO. 2316 OF 2007

KITANGILA LIMITED……..……..…..... PLAINTIFF

-VERSUS-

KEZIAH MUMBI PAUL…….....1ST DEFENDANT

FRANCIS MWANZA MULWA.....2ND DEFENDANT

FORWARD AGENCIES LIMITED ……. 3RD DEFENDANT

REGISTRAR OF TITLES …….. 4TH DEFENDANT

MAVOKO MUCICIPAL COUNCIL ……5TH DEFENDANT

WISDOM AGENCIES LIMITED ……. 6TH DEFENDANT

RULING

Both the 3rd and 6th Defendants have filed two separate Notices of Motion Applications which are both dated 31st July 2013 seeking that the Directors of the plaintiff namely **Francis Mburu Mungai** and **Geoffrey Mutisya Mbili** be held in contempt of court of the order given on 15th January 2008 and issued on 21st January 2008 and be committed in prison for a period of six (6) months or for such period as the court may deem necessary for disobedience of the said court order. The Applicants state that by the court order given by the court on 15th January 2008 by **Hon. Justice Kubo** (as he then was) the parties were directed/ordered to maintain the status quo in respect of **L.R.NO.10426/24, 10426/26** and **10426/27** until the hearing and determination of the application by the plaintiff. The Applicants aver that the order by **Hon. Justice Kubo** was duly extracted and issued to the parties but the plaintiff in defiance of the order caused the suit land to be amalgamated transferred to one **Nirish Chandulal Shah** on the 31st January 2013 pursuant to an order issued in **Machakos HCCC NO. 282 of 2012** where the said **Nirish Chandulal Shah** was the plaintiff and the plaintiff herein the Defendant.

The Applicants state the plaintiff/Respondent was at all material times aware of the existence of the orders issued by **Kubo, J.** but nonetheless proceeded to deal with the property in total disregard of the court order. The applicants aver that the plaintiff through its directors are in defiance of clear and unambiguous order of the court and their conduct undermines the authority and dignity of the court and they ought to be held in contempt of the court and punished to ensure that the court's authority and dignity is not eroded and/or brought into disrepute. The Applicants state that **Honourable Justice Kubo**

on the 15th January 2008 inter alia made the following orders in open court in the presence of the plaintiff/Respondent's Advocates:-

i. **That the plaintiff/Applicant be and is hereby granted leave to file and serve a further affidavit within 10 days with corresponding leave to 2nd, 3rd and 6th Defendants to file further affidavits within 7 days of service.**
ii. **That the status quo in respect of L.R.NO.10426/24, 10426/26 and 10426/27 be maintained until the hearing and determination of this application i.e the suit properties be preserved.**
iii. **That fresh hearing dates be taken at the registry on priority basis.**

The Applicants assert that the orders were extracted and together with a penal notice were served on all the parties including the plaintiffs and that the directors of the plaintiffs were aware of the existence of the said orders. The Applicants depone that the plaintiff ignored the orders and in defiance of the same caused the transfer of the suit property to **Nirish Chandulal Shah** with the objective of defeating the course of justice. The Applicants assert that the plaintiff being fully aware of the existence of the orders of the court have proceeded to deal with the suit property in total disregard of the said orders and that their acts are blantant and willful contempt of the said orders and aver that the plaintiff ought in the interest of justice and for purposes of upholding the dignity of the court to be punished by the court in terms of the prayers sought in the Applicants respective applications.

The plaintiff in response to the Applicants application for contempt filed a replying affidavit through one **Francis Mungai Mburu** a director of the plaintiff dated 9th September 2013 in opposition to the application. The plaintiff's directors denied being in contempt of court and specifically deponed that the plaintiff instructed the firm of **Kwengu & company** Advocates together with **Nzioka & Company Advocates** to act for them in this suit on 9th April 2012 and that after consulting with their said Advocates it was the advise of the Advocates that the suit be withdrawn since the Defendants had not taken any action adverse to the interests of the plaintiff. That following the consultations with their Advocates the plaintiff depones that they on 14th April 2012 wrote to the Advocates instructing them to withdraw the suit and that the firm of **Nzioka and**

Company Advocates vide a letter dated 20th April 2012 notified the plaintiff that the suit herein had been withdrawn. The plaintiff has annexed this letter as **"FMM2**" and has further annexed a copy of the Notice of withdrawal of the suit dated 17th April 2012 and shown to have been filed in court on the same date as per the court stamp thereon together with a copy of the court receipt **NO. 5494 834** dated 17th April 2012 together **annexed and marked "FMM3".** The plaintiff thus avers that as at 31st August 2012 when the consent order in **Machakos HCCC NO. 282 of 2012** was entered into between the plaintiff and **Nirish Chandulal Shah** the present suit had been withdrawn and there was no active suit between the plaintiff and the Applicants such that there was no order in existence that the plaintiff could have disobeyed and/or breached.

The plaintiffs have further averred that the order that they are alleged to have disobeyed had lapsed by effluxion of time by virtue of Order 40 Rule 6 of the Civil Procedure Rules, 2010 which clearly stipulates that any order of injunction granted by the court would remain valid only for a period of 12 months unless the court for any sufficient reason orders otherwise. Consequently the plaintiffs seek a dismissal of the two notices of motion dated 31st July 2013.

The 3rd and 6th Defendant/Applicants through one **Alex Muema Muthengi** in response to the replying affidavit by the plaintiff's director, **Francis Mungai Mburu** swore further affidavits dated 8th November 2013 and 14th October 2013 respectively. The Deponent states that **Kwengu and Company Advocates** was not properly on record when he filed the Notice of withdrawal on 17/4/2012 yet a Notice of change of Advocate to place them on record was filed on 20/4/2012.

Further it is contended by the Applicants that the firm of **Nzioka** & **Company Advocates** had no locus standi to act in the matter. The Deponent further states that the firm of **Kwengu and Company**

Advocates engaged the Applicants through their lawyers in negotiations even after the alleged withdrawal of the suit as evidenced by the draft proposed consents and correspondences annexed and marked **"AMMA-E".**

The 7th Defendant filed a replying affidavit in opposition and depones that he purchased the suit property in November 2006 and a Transfer of the same was executed on 30th July, 2007 long before the orders giving rise to the contempt application were issued by the court. The 7th Defendant depones that a transfer of the suit property was effected pursuant to a decree issued by the High Court of Kenya in **Machakos HCCC NO. 282 of 2012.** The 7th Defendant avers that he has a valid title in respect to the suit property and he is entitled to the rights of ownership as conferred under the law. The 7th Defendant avers that the act of effecting the Transfer of the property to the 7th Defendant of itself cannot constitute contempt as it was done pursuant to a valid decree and order of the court and that order of the court has not been set aside, varied and/or reviewed.

The parties filed written submissions as per the court's directions. The 6th Applicant filed its submissions dated 19th December 2013 on the same day while the 3rd Applicant filed its submissions dated 7th February 2014 on 11th February 2014. The plaintiff filed its submissions dated 12th February 2014 on the same day and the 7th Defendant filed his submissions dated 10th February 2014. I have carefully perused the applications and the responses together with the filed submissions by the parties and the issues that stand out to be determined in this application are:

i. Whether the order of 15th January 2008 affected the plaintiff in its operation and if so whether the plaintiff's directors had notice of it or were aware of its existence.
ii. What was the effect of the Notice of withdrawal of suit filed on 17th April 2012 by the firm of **Kwengu and Company Advocates**?
iii. Whether the plaintiff through its directors are guilty of contempt of court orders issued on 15th January 2008.

Both the 3rd and 6th Defendants prior to filing the substantive motions dated 31st July 2013 seeking orders for contempt as against the plaintiff and its directors applied for leave and were granted leave to commence committal proceedings on 25th July 2013. The Applicants have brought the application under section 5 (1) of the Judicature Act Cap 8 Laws of Kenya and the applicable Laws of England.

Section 5(1) of the Judicature Act provides as follows:-

> **5.(1) The High court and the court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of justice in England and that power shall extend to upholding the authority and dignity of subordinate courts.**

Thus the courts in Kenya inorder to punish for contempt under the provisions of section 5 (1) of the Judicature Act are obligated to establish what for the time being the law applicable in England is as our courts under the Act 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---".** The law in England has overtime changed such that the courts in England nolonger apply Order 52 of the Rules of Supreme Court of England. The Kenya Court of Appeal in the recent case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others (2014) eKLR** considered the application of section 5 (1) and (2) of the Judicature Act where they held that the provision imposes a duty on the High Court, the court of Appeal and law practitioners to ascertain the applicable law of contempt in the High Court of Justice in England, at the time an application is brought so as to determine the applicable law relating to contempt of court proceedings.

The Court of Appeal in the case noted that the law of contempt in England changed with the amendment in October 2012 of the Civil Procedure (Amendment NO.2) Rules 2012 which brought into force PART 81 which effectively replaced Order 52 of the Rules of the Supreme Court in its entirety with the result that applications and proceedings relating to contempt of court now have to be brought under part 81 of

the Civil Procedure Rules of England.

The relevant rule under part 81 would be rule 81.4 which relates to committal for breach of a judgment, order or undertaking to do or abstain from doing an act. In a recent ruling of this court in the case of **Superior Homes (K) Ltd –vs- East African Portland Cement (HC ELC NO. 931 of 2013** (unreported) delivered on 28th August 2014 this court held that the current Civil Procedure Rules (of England) are now applicable to court proceedings brought under section 5(1) of our judicature Act. In the matter I rendered myself as follows:

"Rule 81.4 of the rules relating to "committal for breach of a judgment order or undertaking to do or abstain from doing an act" is the one applicable to the application before me and I am satisfied no leave is required to be given before committal proceedings for breach of judgment or order given by the court is initiated. Under Rule 81.4 an applicant is only required to make an "application notice" and no "permission" or leave is required before the application is made unlike under Rules 81.11 and 81.17 relating to committal for interference with the due administration of justice and committal for making false statement of truth or disclosure statement respectively where "permission" to make the respective applications has to be obtained".

In the court of Appeal case of **Christine Wangari Gachege –vs- Elizabeth Wanjiru & 11 others (supra**) which I relied upon the judges in regard to the application of Rule 81.4 observed thus:-

> **"An application under Rule 81.4 (breach of judgment, order or undertaking) now referred to as "application notice" (as opposed to a notice of motion) is the relevant one for the application before us. It is made in the proceedings in which the judgment or order was made or the undertaking given. The application notice must set out fully the grounds on which the committal application is made and must identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon.**
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> **The application notice and the affidavit must be served personally on the respondent unless the court dispenses with service if it considers it just to do so or the court authorizes an alternative method or place of service".**

I have made reference to these authorities to illustrate the current procedure and practice in commencing committal proceedings for contempt of court in the High Court of Justice in England and to dispel the notion that an applicant in proceedings for contempt of court in an application grounded under section 5(1) of the Judicature Act needs to obtain leave before commencing contempt of court proceedings related to breach of a judgment, order or undertaking. No such leave is required. Equally for applications under Order 40 Rule 3(1) relating to breach or disobedience of injunction orders no leave would be required to be obtained before commencing contempt of court proceedings.

The Applicants applications before me in the premises ought to have been predicated on the provisions of part 81 Rule 4 of the Civil Procedure Rules that replaced Order 52 of the Supreme Court Rules of England. Save for the fact that under Order 52 of the Supreme court Rules leave to commence contempt proceedings was a prerequisite, the other requirements necessary for a Respondent to be punished for contempt of court remain the same. In regard to the application before me nothing really turns on whether or not the appropriate procedure was followed by the Applicant in commencing the contempt of court proceedings and I will thus turn to consider the application on its merits.

The order of 15th January 2008.

The order of 8th January 2008 granted by Hon. Justice Kubo (as he then was) firstly granted the parties leave to file further affidavits respecting the application by the plaintiff, secondly it directed that **"the status quo in respect of L.R NOS10426/24, 10426/26 and 10426/7 be maintained until the hearing and determination of this application i.e the suit properties be preserved,**" and thirdly that fresh hearing dates be taken at the registry on priority basis. It is the 3rd and 6th Defendants/Applicants

contention that the plaintiff acted in defiance and in disobedience of the court's order directing that the status quo in respect of the suit properties be maintained and the properties be preserved until the application was heard and determined by effecting the transfer of the suit property to the 7th Defendant.

The genesis of the court orders of 15th January 2008 was the plaintiffs chamber summons application dated 28th November 2007 through which the plaintiff sought an order of injunction against the Defendants jointly and severally for an order of temporary injunction restraining them from subdividing selling, leasing, approving any plan for development, registering any transfer/assignment without the plaintiff's consent or carrying out any other developments whatsoever in respect of **L.R.NOS. 10426/7, 10426/24** and **10426/27** pending the hearing and determination of the suit. Inter alia the grounds of the plaintiff's application were that:-

i. That the 3rd and 6th Defendants are in the process of illegally transferring **L.R. NO.10426/7, L.R.NO.10426/24** and **L.R.NO.10426/27** to themselves without the consent of the plaintiff who has not signed any transfer/assignment in their favour.
ii. That despite the plaintiff's willingness to refund the sums paid by the defendants the 3rd defendant has refused and/or neglected to surrender the original deed plans in respect of **L.R.NO.10426/24, 10426/26 and 10426/7.**
iii. The plaintiff stands to suffer irreparable loss if the unlawful transfer and developments on its land are not stopped forthwith.

Although the record shows the plaintiff in compliance with Hon. Justice Kubo's directions filed a further affidavit on 25th January 2008 there is no indication that the Defendants filed any further affidavits as per the leave granted. The record does not show that the said plaintiff's application was ever fixed for hearing though it was ordered that fresh hearing dates be taken at the court registry on a priority basis. The next hearing date fixed in this matter was on 25th July 2013 when the 3rd and 6th Defendants chamber summons application dated 8th July 2013 seeking leave to commence contempt of court proceedings against **Francis Mungai Mburu** and **Geoffrey Mutisya Mbili** being directors of the plaintiff was fixed for hearing and the leave was granted which precipitated the filing of the present applications for contempt against the plaintiff dated 31st July 2013.

I have reverted to a brief background of the matter to contextualise the basis against which the applications have to be considered and determined. The plaintiffs have contended that the order of 15th January 2008 was not directed against them and it is their submissions that the order was directed against the Defendants who had sought to cause subdivisions and transfer of the suit properties. The plaintiff argues the Defendants as at the time the order of status quo and preservation of the property was given, did not have a claim on the property and had not pleaded any counterclaim and that the order was directed at the Defendants to restrain them from in any manner interfering with the suit properties. The plaintiff asserts that it is the Defendants who were served with the court order and submits that the penal notice endorsed on the order given on 15th January 2008 and issued on 21st January 2008 shows clearly that the order was directed to the Defendants whose names appear under the Notice of penal consequences.

The plaintiffs have further submitted that at the time of entering the consent order recorded in **Machakos HCCC NO. 282 of 2012** which resulted in the decree that granted the suit property to the 7th Defendant herein they were not aware that the present suit was alive since their Advocates had advised them that the present suit had been withdrawn. The plaintiffs thus contend that they did not deliberately intend to disobey the court order.

The plaintiff has further contended that in any event the order they are stated to have breached and disobeyed had lapsed it having not been extended beyond the period of 12 months permissible under the provisions of Order 40 Rule 3 of the Civil Procedure Rules, 2010.

It is generally accepted that seeking to commit a party for contempt of court is a serious indictment and is analogous to a criminal proceeding. As is the case in criminal proceedings the standard of proof in

contempt of court proceedings is higher than on a balance of probabilities but perhaps lower than proof beyond a reasonable doubt. For an applicant to establish contempt of court one has to prove and establish that the contemnor was served with the order and knew of the consequences for disobedience of the order. The order further must be clear and unambiguous.

The practice has been that before the court could punish a party for contempt of court the applicant was required to prove and establish that the contemnor had been personally served with the order that it is alleged he has breached and/or disobeyed and further that the order served on the contemnor had been endorsed with a penal notice warning the recipient of the order of the consequences for disobedience. In the Court of Appeal case of **Ochino & Ano. –vs- Okombo & 4 others (1989) eKLR 165** the court considered the conditions to be satisfied for a person to be held to be in contempt and held that:-

i. A copy of the order has to be personally served on the person required to do or abstain from doing the act in person.
ii. The copy of the order served must be endorsed with a notice informing the person on whom the copy is served that if he disobeys the order he is liable to the process of execution to compel him to obey.
iii. The court will only punish as a contempt a breach of injunction if it is satisfied the terms of the injunction are clear and unambiguous.
iv. That the Defendant has proper notice of the terms and the breach of the injunction must be proved beyond reasonable doubt.

The court of appeal in reaching its decision in the above case referred with approval to its earlier decision in the case of **Mwangi Magondu –vs- Nairobi City Commission (Civil Appeal NO. 95 of 1988)** where it stated thus:-

> **"This requirement is important because the court will only punish as a contempt a breach of injunction if satisfied that the terms of the injunction are clear and unambiguous, that the defendant has proper notice of the terms and that breach of injunction has been proved beyond a reasonable doubt".**

The Applicants have submitted that the contemnors knew of the existence of the order and therefore had notice of the same and needed not to have been personally served. The Applicants referred the court to the ruling by **Mbaeya J.** in **Africa Management Communication International Ltd –vs- Joseph Mathenge Mugo & Another (2013) eKLR** to support this proposition where the judge stated.

> **"It is clear that the 1st Defendant was aware of the orders of the court as he complained that the plaintiff had run an advertisement concerning the same on the dailies-----To that extent, I find the 1st defendant had knowledge of the existence of the order and the issue of personal service upon him does not therefore arise. In any event the 1st Defendant did not contest knowledge of the existence of the order. I am guided by the holding of Lenaola J, in the case of Basil Criticos –vs- Attorney General & 8 others (2012) e KLR where he stated that**
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> **"the law has changed and as it stands today knowledge supercedes personal service----- where a party clearly acts and shows he had knowledge of a court order the strict requirement that personal service must be proved is rendered unnecessary".**

I approve of the position taken by both **Mabeya J,** and **Lenaola J.** and I agree that what is critical is that the Respondent has knowledge of the existence of the order and of its terms. A party may while knowing an order has been issued deliberately evade being served with the order personally particularly where he is determined to disobey the same only to come around to state that he was not personally served with the order and therefore he cannot be held to be in contempt. I do not suppose that would be an acceptable state of affairs. This line of thought has support as observed in the recent decisions referred to and the Halsbury Laws of England 4th Edition paragraph 65 where on the issue of service It states:-

"Where an order requires a person to abstain from doing an act, it may be enforced notwithstanding that service of a duly indorsed copy of the order has not been served. If the court is satisfied that such service, the person against whom enforcement is sought has had notice of the terms of the order either by being present when the order was made or by being notified of the terms of the order, whether by telephone, telegram or otherwise".

In the instant case all the parties counsel were present in court on 15th January 2008 when the subject order was made. The plaintiff's counsel extracted the order and had the same served on the Defendants. True, the order may not have been personally served on the plaintiffs but I have no doubt the plaintiffs were aware of its existence and had notice of its contents.

As to what the effect of the status quo order was as relates the plaintiff my view is that the order fell short of defining the status quo and in particular what the order restrained. Orders requiring the status quo to be maintained usually are the source of interpretation difficulties where the court has not specifically set out the status quo to be maintained. In such instances each party interprets the order in the manner that best serves its interest. In the present matter the court in addition to requiring the status quo to be maintained went further to indicate that the **"suit property to be preserved**". It may thus be argued, as the Applicants have argued that the status of the suit property was to remain in the state it was in at the time the order was made. For my part I would accept that position as the suit property could not be preserved otherwise than by maintaining it in the position that it was in. Thus a dealing with the property in a manner that altered the order of preservation of the property would be in breach of the order. The question however lingers whether the act of the plaintiff in dealing with the suit property in the manner they did was deliberate and intended to disobey the court order and to defeat the ends of justice.

The plaintiffs have stated that they had no knowledge that the court order was still in force at the time they dealt with the property stating that they had been advised by their counsel that he suit had been withdrawn and a Notice of withdrawal of the suit dated 17th April 2012 has been exhibited. The plaintiffs have also stated they sanctioned the withdrawal of the suit against the defendants. Under Order 25 of the Civil Procedure Rules, a plaintiff's right to withdraw a suit is unfettered particularly where the suit has not been set down for hearing. The plaintiff in my view could withdraw the suit if it wished to do so. The Applicants have taken issue with the manner the plaintiff's Advocates **Kwengu & Company Advocates** came on record and the manner the Notice of withdrawal of the suit was lodged in court. The fact however remains the Notice of withdrawal is shown to have been filed and the plaintiff was advised of this fact. The record further confirms the law firm of **Kwengu & Company Advocates** eventually filed their Notice of change of Advocates in court on 20th April 2012.

The significance of these events is that the plaintiff was in a matter of fact led to believe that the suit they had instituted against the defendants had been withdrawn and that being the case any interlocutory orders made in the suit would dissipate. The acts complained of by the Applicants took place after 31st August 2012 following the recording of a consent order in the Machakos suit. I am not persuaded in the circumstances and having regard to the attendant events that the plaintiff deliberately disobeyed the court order of 15th January 2008 as they may have genuinely believed there was no active litigation pending between them and the applicants when they entered the consent in the Machakos suit and subsequently transferred the suit property to the 7th Defendant. My view is that actual **"mens rea**" on the part of the plaintiff to disobey the court order has to be proved otherwise it cannot be stated the plaintiff willfully and deliberately disobeyed the court order.

There is yet another aspect of this matter that calls for my comment. The plaintiffs have submitted that the order relied upon by the Applicants had lapsed upon the expiry of 12 months from the date of the coming in force of the Civil Procedure Rules, 2010. The plaintiff's application for injunction herein was made under the previous Order XXXIX Rules 1 and 2 of the previous Civil Procedure Rules (repealed) and that the equivalent provisions are now to be found under Order 40 of the current Civil Procedure Rules, 2010.

Order 40 Rule 6 provides:-

"Where a suit in respect of which an interlocutory injunction has been granted is not determined within a period of twelve months from the grant, the injunction shall lapse unless for any sufficient reason the court orders otherwise".

The transition provision under Order 54 Rule 2 of the Civil Procedure Rules provided for the suits that were pending and provided thus:-

"2. In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time the coming into force of these rules, the provisions of these rules shall thereafter apply, but without prejudice to the validity of anything previously done.

Provided that:

a. **If, and in so far as it is impracticable in any such proceedings to apply the provisions of the Rules, the practice and procedure heretofore obtaining shall be follows,**
b. **In any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted".**

Hon. Justice Mabeya, had occasion to consider the application of Order 40 (6) to suits that were pending before the effective date of the Civil Procedure Rules 2010 in the case of **Michael N. Muigai Kenyatta & Another – vs- Barclays Bank of Kenya Ltd & others** (**HCCC NO. 385 of 2010 Milimani)** and he observed thus:-

"The said rule in my view is clear in its purport. That the new rules were intended to apply to proceedings that were pending in court before the rules came into force. It is only where there is difficulty in compliance that the is Chief Justice expected to make practice notes or directions as to the procedure. It has not been shown that it is difficult to apply Order 40 Rule 6 of the Civil Procedure rules to this suit".

I agree with **Mabeya J,** that Order 40 (6) read together with Order 54 (2) of the Civil Procedure Rules 2010 was intended to apply to previously pending suits before the new Civil Procedure Rules came into force. Order 40(6) of the new Civil Procedure Rules was intended to redress situations where parties who obtained orders of injunctions sat on them and never bothered to prosecute their suits often occasioning great prejudice against the party to whom the injunction was directed.

It is my view therefore that any party who had an injunction granted in their favour prior to the coming into force of the new rules had an obligation to seek and obtain extension of the order at any rate within 12 months of the coming into force of the new Civil Procedure Rules otherwise the orders lapsed within the expiry of 12 months from the date the new Rules came into force.

In the instant suit the status quo order was granted on 15th January 2008 pending the hearing interpartes of the plaintiffs application that was brought to court under a certificate of urgency. As observed earlier in this ruling that application was never fixed for hearing interpartes and up and until the time the instant application for contempt was brought had not been heard. The Applicants have taken the view that the status quo order was an order of restraint and no doubt the same required to be in conformity with Order 40 Rule 6 following the coming into force of the new Rules. It is unclear why none of the parties sought to have the plaintiff's application dated 28th November 2007 heard and determined even after the court directed the hearing to proceed on a priority basis.

Order 40 Rule 6 by virtue of the transitional provisions of order 54 rule 2 quite clearly had a retroactive operation and it is my holding that there was no order in force at the time the applicants brought this application and thus the plaintiffs cannot be liable for contempt of court of an order that was not there at the time of the commission of the acts it is alleged constitute disobedience of the order.

In the premises and for all the reasons canvassed in this ruling I find the applications by the 3rd and 6th

Defendants dated 31st July 2013 devoid of merit and I decline to grant the prayers sought. I order that each party bears their own costs of the application.

Ruling dated, signed and delivered at Nairobi this…**30th**...day of…**September…**2014.

J. M. MUTUNGI

JUDGE

In presence of:

Anzala …….. For the Plaintiff

Mr. Omondi ……..….. For 3rd & 6th Defendants

Mr. Zarvyia ……. For 7th Defendant