IN THE COURT OF APPEAL

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 24 OF 2014

BETWEEN

JUSTUS KARIUKI MATE.....1ST APPELLANT

JIM G. KAUMA.....2ND APPELLANT

AND

HON. MARTIN NYAGA WAMBORA.....1ST RESPONDENT

THE COUNTY GOVERNMENT OF EMBU...2ND RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Kerugoya (Ong'udi,

Githua & Olao, JJ.) dated 16th April, 2014

in

Petition No. 3 of 2014 consolidated with Petition No. 4 of 2014, Judicial Review No. 6 of 2014 & Misc. Appl. No. 4 of 2014)

JUDGMENT OF THE COURT

[1] This is an appeal against part of the judgment of the High Court dated 16th April 2014, arising from Kerugoya Misc. Application No. 4 of 2014. The part of the judgment, which is subject of this appeal, is in regard to the orders citing the 1st and 2nd appellant for contempt of court for disobedience of the court orders issued on 23rd January 2014. The appellants are the Speaker and Clerk of the County Assembly of Embu respectively.

[2] The genesis of this protracted matter goes back to the year 2013, when the County Government of Embu, the 2nd respondent herein, procured services of contractors to face lift Embu County Stadium and also to supply maize seed to local farmers. An advertisement was made for tenders for supply and distribution of maize seeds to the farmers in the County. Unfortunately, the County Assembly of Embu was dissatisfied with the manner in which the stadium was refurbished and the type and quality of maize seeds supplied to farmers. Consequently, on 3rd January, 2014, the County Assembly summoned the then County Secretary, Margaret Lorna Kariuki, to appear on 6th January, 2014 before the joint committee on infrastructure youth and sports and the joint committee on agriculture, livestock, fisheries and co-operatives to answer queries over the stadium and the maize seeds supplied to farmers.

[3] According to Margaret Lorna Kariuki, the summons were delivered to her office on Friday the 3rd January, 2014 after working hours and she only received it on Monday the 6th January, 2014 at 8:30 a.m. when she went to the office. She wrote to the County Assembly of Embu seeking an extension of 21 days so as to prepare comprehensively to answer the queries over the aforementioned issues. The County Assembly did not respond and instead made recommendations to the Governor, the 1st respondent herein, to suspend Margaret Lorna Kariuki pending investigations by the Ethics and Anti- Corruption Commission (EACC).

[4] On 16th January, 2014, a Motion was tabled in the County Assembly seeking the impeachment of the 1st respondent from office on the grounds that he had refused and/or neglected to act on the recommendations by the Assembly which amounted to gross violation of the ***Constitution*** and abuse of office. Thereafter, the County Assembly resolved to move the said Motion on 23rd January 2014, when it resumed sitting. According to the 1st respondent, he learnt that members of the County Assembly had planned to meet at a secret venue in Mombasa to pass the resolution of his impeachment in his absence. Being apprehensive that the County Assembly would pass a resolution to impeach

him contrary to the law and in violation of his fundamental rights, the 1st respondent filed **H.C Petition No. 1 of 2014.**

[5] In that petition the 1st appellant was seeking *inter alia* for declaratory orders that the County Assembly's Motion for his impeachment was contrary to the ***Constitution***. That petition was filed under certificate of urgency and it was accompanied by an interlocutory application that sought exparte conservatory orders pending the hearing of the petition. That application fell for hearing before Githua, J. on 23rd January, 2014. The learned Judge issued the conservatory orders restraining the appellants from proceeding with the impeachment proceedings without first giving the 1st respondent notice of the charges levied against him and without affording him an opportunity to defend himself. According to the 1st respondent, the said order was served upon the 1st and 2nd appellants on 23rd and 24th January, 2014 respectively. Thereafter, the said orders were published in the Daily Nation and the Standard Newspaper on 26th and 27th January, 2014 for all and sundry to note. The 1st respondent maintains that the appellants were served with the orders as well as the penal notices.

[6] The respondents contend that despite being served with the aforementioned court order, the appellants proceeded with the impeachment process on 28th January 2014, wherein the County Assembly passed the motion of impeachment. Consequently, the respondents filed Misc. Application No. 4 of 2014 seeking leave to apply for committal of the appellants to civil jail for six months for contempt of court orders. The High Court granted the leave sought on 29th January, 2014.

[7] In response to the application for committal for contempt of the court orders, the appellants denied having been served with the orders dated 23rd January, 2014 or being aware of the same. Through their sworn depositions, the appellants averred that they become aware of the said orders when they were served with the contempt application. They both denied seeing the aforementioned orders in the daily newspapers. They also contended that they were not parties to Petition No. 1 of 2014 and nor were they parties to the orders dated 23rd January, 2014. They argued that they had no role in deciding the business of the County Assembly and the 1st appellant merely facilitates the deliberations and proceedings decided upon by members of the assembly while the 2nd appellant only coordinates and facilitates the deliberations of the said proceedings. According to the appellants, the impeachment proceedings against the 1st respondent had commenced and proceeded before the orders dated 23rd January, 2014 were issued. The appellants further contended that the impeachment proceedings were conducted with the County Assembly and within its Chambers; they were privileged under the National Assembly (Powers and Privileges) Act and did not attract civil or criminal liability.

[8] The aforesaid application was heard together with the 1st respondent's petition. After considering the application on its merits, the High Court vide the judgment dated 16th April, 2014 found that the appellants were aware of the court orders dated 23rd January, 2014 and deliberately disobeyed the same. The High Court found the appellants in contempt of court orders and directed summons be served on them to appear in Court on 15th May, 2014 for further orders. It is that decision that has provoked this appeal based on the following grounds:-

- ***The learned Judges erred in failing to determine and find that the application for contempt of court by the respondents, was fatally defective for want of compliance with the applicable rules that require a notice of an application for contempt to be made to the Attorney General before the application is admitted for hearing by the court.***
- ***The learned Judges erred in finding that the appellants had been served with the said orders of the court whereas there was no evidence tendered detailing service thereof upon the appellants.***
- ***The learned Judges erred in finding that the appellants had notice of the order of the court at all material times without any evidence of service of the order.***
- ***The learned Judges erred in fact and in law in finding that the service of the court order upon third parties as detailed in the affidavits of service rendered by the respondents, constituted service upon the appellants for the purposes of the application for contempt of court.***
- ***The learned Judges erred in law in failing to find that the law on contempt of court requires personal service of an order as provided under Order 48 Rule 2 of the Civil Procedure Rules.***
- ***The learned Judges erred in law in finding that the law on service of court orders has changed and that there is no longer a requirement in law to demonstrate service of a court order in an application for contempt.***
- ***The learned Judges erred in law in finding that the law on service of an order in Kenya requires proof of notice of the order as opposed to proof of service.***
- ***The learned Judges erred in law in failing to find that the acts purportedly constituting contempt of court on the part of the applicants are actions taken out in execution of the office of the Speaker of the County Assembly of Embu and are part of the proceedings of the County Assembly and which under the mandatory provisions of Article 196(3) of the Constitution as read together with the provisions of the National Assembly (Powers and Privileges) Act, Chapter 6 together with the County Government Act attract absolute privilege from civil and criminal liability.***
- ***The learned Judges erred in fact and in law in finding that the advertisements of the court order in a newspaper without leave of the court, constituted good service for purposes of notice of an order to a party and for purposes of an application for contempt of court.***

[9] By a consent order recorded in court on 24th June, 2014 the parties agreed to prosecute this appeal by way of written submissions and oral highlights. Mr. Njenga, learned counsel for the appellants argued that the contempt proceeding as filed by the respondents was incompetent. He submitted, contrary to ***Order 52*** of the ***Rules of the Supreme Court of England,*** the respondents failed to give notice of intention to commence the said proceedings to the Attorney General, failure to issue the notice was not a procedural technicality that is capable of being cured under ***Article 159*** of the ***Constitution*** but was a material irregularity which extends to the question of jurisdiction. The appellants argued that the trial court ought to have dismissed the contempt proceedings on this ground.

[10] It was Mr. Njenga's case that without a clear finding that service of an order was effected on the appellants, they could not have been found to have acted in contempt of the orders which they had no knowledge about. It was the appellants' submission that the law on service of court orders is clear, unambiguous and settled. Order ***48*** of the ***Civil Procedure Rules*** provides that service of orders on any person ought to be served in the manner provided for service of summons. The appellants argued that ***Order 5*** of the ***Civil Procedure Rules*** which

provides for service of summons requires that service be effected upon a person and where it is not possible then substituted service may be employed, but only with leave of the court. According to the appellants, the essence of the aforementioned prescribed mode of service of court orders is an appreciation that for any party to be held liable for disobedience of such an order, it ought to be clear that such a party was aware of the said order.

[11] It was further argued for the appellants that the trial court erred in finding that knowledge as opposed to proof of personal service of the order in question was sufficient in citing a party for contempt. Placing reliance on this Court's decision in ***Kariuki & 2 others -vs- Minister for Gender, Sports, Culture & 2 Others*** ***(2004) 1 KLR 78***, it was submitted that proof of personal service was necessary for the trial court to entertain contempt proceedings, given that the respondents had denied being served. It was submitted that there was no basis in law that supported the trial court's position that the law on contempt proceedings had changed; the trial court ought to have applied the law as it is and should not have varied the law based on its opinion on what it ought to be.

[12] The appellants also faulted the trial Court's findings that the appellants had knowledge of the order based on the letter dated 28th January, 2014 from the Deputy Registrar of the High Court. The letter was merely confirming the authenticity of the order dated 23rd January, 2014. The said letter bears the County Assembly's stamp acknowledging receipt of the same on 28th January, 2014. According to the appellants, there is no proof that the same was served upon them because there was no affidavit of service in relation to service of the said letter. They further argued that the said letter was not addressed to the appellants.

[13] Mr. Njenga went on to submit that the trial court erroneously relied on the affidavit of service sworn by Mr. Njuguna Njoroge to find that the appellants had been served with the order whereas it was clear that the deponent served the order upon a secretary and one Boniface Muthomi and not the appellants; the deponent failed to state whether any attempt was made to serve the appellants personally; consequently, the said affidavit was inadequate for purposes of citing the appellants for contempt. Further the trial court erroneously shifted the burden of proof of service to the appellants by finding that the persons allegedly served with the orders, that is the secretary and one **Boniface Muthomi,** ought to have sworn affidavits denying service and/or the appellants should have applied to cross examine Mr. Njuguna on the affidavit of service.

[14] The appellants also faulted the advertisement of the order in the local dailies arguing that substituted service was done without leave of the court. The appellants also argued that knowledge of a notice published in the media is a rebuttable presumption of fact, and that they had expressly denied in their respective affidavits notice of the said adverts. All in all, since the substituted service was made without leave of the court it had no legal effect and therefore could not bear legal sanctions.

[15] It was the appellants' contention that they did not act in contempt of the court order in question. This is because firstly, the court order restrained the appellants and the 2nd respondents from holding impeachment proceedings which according to the appellants, is the actual debate and resolution to remove the 1st respondent from office. They argued that the motion to impeach the 1st respondent was moved by Hon. Ibrahim Swaleh and the County Assembly passed the motion. Therefore, it was Hon. Ibrahim Swaleh who was required to give the 1st respondent notice of the charges against him. The appellants maintained that they neither moved the motion nor voted on it hence they were not the ones who were responsible for the impeachment proceedings. Therefore, there was no actual act of disobedience of the order by any of the appellants. Secondly, the trial Court in holding that the appellants were in contempt found that they failed to apply the standing orders to prevent the debate on the impeachment of the 1st respondent. According to the appellants, by virtue of ***Section 29*** of the ***National Assembly (Powers & Privileges) Act***, ***Chapter 6, Laws of Kenya***, the trial court had no jurisdiction to interfere with the 1st appellant's exclusive power to determine the import and application of standing orders. Thus, the trial court erred in relying on this ground in finding that the appellants had disobeyed the court order. Thirdly, the appellants maintained that the terms of the said order were restricted to holding impeachment proceedings; however there was no positive imperative in the order that enjoined the appellants as a matter of law to ensure that the order was complied with by the County Assembly. It was submitted that the actions of the assembly could not be visited in terms of liability upon the appellants.

[16] Mr. Njenga took a two pronged approach and argued this appeal in the alternative, thus he submitted without prejudice to the foregoing arguments; the impeachment proceedings were conducted in the County Assembly. Such proceedings are privileged and no civil or criminal liability could accrue as against the appellants by dint of the ***National Assembly (Powers & Privileges) Act*** and the ***Constitution***. Appellants urged this Court to allow the appeal as prayed.

[17] Senior Counsel Messer's Muite and Ahmednassir Abdulahi teaming up with Issa Mansur, Kemboy, Wanyama and David Njoroge appeared for the 1st respondent. Formidable opposition was put forth against this appeal. Mr. Muite submitted that contempt proceedings have a bearing on public confidence in the entire administration of justice as it undermines the rule of law. He pointed out that pursuant to ***Article 159(1)*** of the ***Constitution*** judicial authority is derived from the people and it is exercised for the benefit of the people. Thus, Courts must uphold its integrity by protecting the rule of law from those who are bent on undermining it, by disobeying court orders. The core issue in this appeal is one of service of the court order upon the appellants which was done upon their offices and out of abundant caution the same order was published in the leading daily newspapers with the largest national circulation.

[18] Moreover, the averments contained in the affidavit of service sworn by Mr. Njuguna Njoroge were uncontroverted and unchallenged by the appellants who did not cross examine the deponent. Consequently, the onus shifted to the appellants to prove that the service was faulty which they failed to do. Referring to the letter dated 28th January, 2014 from the Deputy Registrar of the High Court, Mr. Muite submitted that the fact that the appellants sought to determine through the County Commander, the authentication of the order clearly shows that they acknowledged service of the order. Given the averments by the appellants in their replying affidavits that the order was incompetent, it was logical to conclude that the appellants were served with the order which they termed "incompetent".

[19] According to counsel for the 1st respondent, under the County Assembly of Embu standing orders Nos. 24 & 36, it is the 1st appellant as the Speaker who is mandated to preside over the business of the County Assembly and hence had the responsibility of ensuring compliance of the Court order. On the other hand, the 2nd appellant as the Clerk is in charge of preparing the order paper that indicates the agenda of the County Assembly for a specific sitting; the appellants therefore willfully disobeyed a court order by preparing, approving the order paper and

tabling the motion proposing the impeachment of the 1st respondent. The statutory privilege created under the ***National Assembly (Powers & Privileges) Act*** did not extend to disobedience of court orders; the aforementioned Act was enacted prior to the new 2010 ***Constitution*** hence the privileges asserted therein are subject to the said ***Constitution***; moreover the ***County Government Act*** does not provide for such immunity; thus the guiding principles are as provided for under ***Article 10*** of the new ***Constitution*** which provides National Values and principles of governance. Those values are binding on all public officers. The National Values and principles include the rule of law whose intrinsic core is obedience of court orders; the appellants in discharge of their duties as public officers were duty bound to obey the court order.

[20] On the issue of competency of the contempt proceedings, counsel for the 1st respondent argued that the law on contempt in the United Kingdom has since changed and ***Order 52*** of the Supreme Court Rules of England is no longer applicable since October, 2012. There is no longer a requirement for the Crown in England and by extension the Attorney General herein to be given notice of institution of contempt proceedings prior to filing the proceedings. Therefore, the contempt proceedings were competent. The respondents urged us to regard this line of argument as a mere technicality and to dismiss the appeal with costs.

[21] Based on the foregoing submissions and the record of appeal before us, we have distilled the following issues which fall for determination and we propose to analyze them seriatim:-

- ***Was the contempt application competently before the court?***
- ***Was the order dated 23rd January, 2014 served upon the appellants?***
- ***Did the trial court err in citing the appellants for contempt?***

[22] **Competency of the Contempt application:** The appellants contended that the contempt application was incompetent on the ground that the 1st respondent/ applicant failed to serve the requisite notice to the Attorney General as provided under ***Order 52*** of the ***Rules of the Supreme Court of England*** that requires an applicant in such an application to give notice to the Crown Office (Attorney General) of the contempt application prior to filing. On the other hand, while admitting that notice was not issued, the 1st respondent maintained that the same was not fatal and did not render the proceedings incompetent as the law that is applicable in Kenya is what is applied in England. In England the law changed and it is no longer necessary to serve the notice upon the Crown.

[23] It is imperative in considering this issue to take into account the applicable law and the governing principles in contempt proceedings. As correctly pointed out by this Court in ***Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others, - Civil Application No. 233 of 2007*** the statutory basis of contempt of court in so far as the Court of Appeal and the High Court are concerned is ***Section 5*** of the ***Judicature Act*** and ***Section 63(c)*** of the ***Civil Procedure Act.*** Of relevance to this case is ***Section 5*** of the ***Judicature Act*** which provides:-

> ***" 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.***
>
> ***(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and sentence made in exercise of the original criminal jurisdiction of the High Court."(Emphasis added)***

[24] Based on the foregoing provision, the applicable law in contempt proceedings in Kenya is the law applicable in the High Court of Justice in England at the time the application for contempt was filed in the year 2014. ***In the Matter of an Application by Gurbaresh Singh & Sons Ltd- Misc. Civil Case No. 50 of 1983***, the High Court expressed itself as follows: -

"The second aspect concerns the words of Section 5- 'for the time being', which appear to mean that this Court should endeavor to ascertain the law in England at the time of the trial, or application being made".

[25] What is the applicable law and procedure in contempt of case matters? In ***Christine Wangari Gachege -vs- Elizabeth Wanjiru Evans & 11 Others, (supra),*** this Court stated as follows:-

> ***"Following the implementation of the famous Lord Woolf's Access to Justice Report, 1996', the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rule, 1999. Recently on 1st October, 2012 the Civil Procedure (Amendment No. 2) Rules, 2012 came into force and part 81 thereof effectively replaced Order 52 of the Rules of the Supreme Court of England in its entirety. Part 81 (Applications and proceedings in relation to contempt of Court) provides different procedures for four different forms of violations.***
>
> ***Rules 81.4 relates to committal for 'breach of a judgment, order or undertaking to do or abstain from doing an act.'***
>
> ***Rules 81.11 relates to committal for 'interference with the due administration of justice'. (Applicable only in criminal proceedings)***
>
> ***Rules 81.16- relates to committal for contempt 'in the face of the court.' and***
>
> ***Rules 81.17- relates to committal for 'making false statement of truth or disclosure statement.'***

As per ***Rule 81.1*** the amendment provides the procedure in contempt of court proceedings which applies in the Court of Appeal, the High Court and county courts in England. In this case ***Rule 81.4*** is applicable. ***Rule 81.10*** sets out the procedure for filing a contempt application

is as follows:-

> ***"(3) The application notice must—***
>
> > ***a. set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged act of contempt including, if known, the date of each of the alleged acts; and***
> >
> > ***b. be supported by one or more affidavits containing all the evidence relied upon.***
>
> ***(4) Subject to paragraph (5), the application notice and the evidence in support must be served personally on the respondent.***
>
> ***(5) The court may—***
>
> > ***a. dispense with service under paragraph (4) if it considers it just to do so; or***
> >
> > ***b. make an order in respect of service by an alternative method or at an alternative place.***

The aforementioned provisions left out the requirement of notice to the Crown Office (read Attorney General) prior to filing an application for contempt as was previously required under Order 52. Consequently, the contempt application was competently before the High Court.

[26] **Was the order dated 23/1/2014 served upon the appellants'? *Rule 18.6* of the *Civil Procedure (Amendment No. 2) Rules 2012*** of England provides that a copy of judgment or orders and any orders or agreements fixing or varying the time for doing an act should be served personally. The appellants contend that they were never served with the said order personally or otherwise; they only learnt about the order when the contempt proceedings were commenced. From the record, there are two affidavits of service in relation to the said order. The affidavits were sworn by Mr. Wilfred Nyamu and Njuguna Njoroge on 28th and 29th January, 2014 respectively. Mr. Nyamu averred that he served the order upon the legal clerk of the County Assembly of Embu one Mr. Boniface Ireri, on 23rd January, 2014; while on 24th January, 2014, Mr. Njuguna served the secretary at the County Assembly of Embu offices.

[27] The appellants contend that the affidavit of service sworn by Mr. Njuguna was not in accordance with the law and hence could not be adduced as evidence of service. Under ***Order 5 Rules 15*** of the ***Civil Procedure Rules, 2010,*** provides that where the process server deposes that personal service was not possible, it should be indicated in the affidavit of service the attempts made to effect personal service, (See this Court's decision in ***Yalwala -vs- Indumule & Another, - Civil Appeal No. 69 of 1987).*** He submitted that the affidavit sworn by Mr. Njuguna did not meet the aforementioned requirements. He failed to set out if he had made an attempt to serve the appellants personally before serving the secretary. However, the affidavit sworn by Mr. Nyamu complied with the said requirements in that he set out the unsuccessful efforts made to effect personal service before serving a legal clerk in the County Assembly who received the order on behalf of the appellants. The affidavit is set out herein below:-

> ***AFFIDAVIT OF SERVICE***
>
> ***I, WILFRED NYAMU OF P.O BOX 75928-00200, Nairobi, an Advocate of the High Court of Kenya, do hereby make oath and state as follows:-***
>
> > **1.** ***That on 23rd January, 2014 with a court order dated and issued on 23rd January, 2014 by the Kerugoya High Court, I proceeded to serve the same upon the Speaker and the Clerk of the County Assembly of Embu.***
> >
> > **2.** ***That on the same day at about 6:45 p.m., I proceeded to the offices located at the County Assembly of Embu premises, along Embu Meru Highway opposite Faith House in Embu and after explaining the purpose of my visit, I served the said court order upon the secretary who informed me that the County Assembly was in session and hence the Speaker and Clerk were engaged and she needed to consult.***
> >
> > **3.** ***That the said secretary then made a call to the legal Clerk, one Boniface Muthomi Ireri, who came and introduced himself as such, and after explaining to him the purpose of my visit, I tendered to him the said court order, that after further consultation, he acknowledged receipt by stamping with their official stamp on the face of the copies at 7:04p.m signed and indicated his name that I return herewith.***
> >
> > **4.** ***That the said secretary of the Clerk and the Legal Clerk of the County Assembly of Embu were personally not known to me at the time of service.***
> >
> > **5.** ***That what is deponed herein is true to the best of my knowledge, information and belief."***

[28] An affidavit of service consists of sworn factual evidence of the deponent. This Court in ***Shadrack arap Baiywo --vs- Bodi Bach, Civil Appeal No. 122 of 1986 (UR)*** while applying the principles restated in; ***Miruka -vs- Abok & Another, [1990] KLR 544***, Platt, JA stated:-

> ***"There is a qualified presumption in favour of the process server recognized in MB Automobile -vs- Kampala Bus Service [1966] EA 480 at p 484 as having been the view taken by the Indian courts in construing similar legislation. On Chitaley and Annaji Rao: The Code of Civil Procedure Vol. II p 1670, the learned commentators say:-***

"3.Presumption as to service – There is a presumption of service as stated in the process server's report, and the burden lies on the party questioning it, to show that the return is incorrect. But an affidavit of the process server is admissible in evidence and in the absence of contest it would normally be considered sufficient evidence of the regularity of the proceedings. But if the fact of service is denied, it is desirable that the process server should be put into the witness box and opportunity of cross-examination given to those who deny the service."

See also this Court's decision in ***Kingsway Tyres & Automart Ltd. –vs- Rafiki Enterprises Ltd., – Civil Appeal No. 220 of 1995.*** Going by the material that is before us regarding the service of the order and the dicta enunciated the aforesaid authorities we agree with counsel for the 1st respondent that the burden lay with the appellants to demonstrate that the affidavit of service was incompetent.

[29] Moreover, Mr. Wilfred Nyamu's affidavit of 28th January, 2014, shows the order of 23rd January, 2014 was served upon the Legal Clerk of the Embu County Assembly, one Mr. Boniface Ireri. It was served on 23rd January, 2014, a position that has not been denied by the appellants. The offices of the Speaker and the Clerk of a County Assembly are public institutional offices and not personal. Both offices have staff and employees attached thereto who act and perform their duties on behalf of the County Assembly. Drawing an analogy that a public institution is the same as a corporate entity, service of summons on an authorized officer or legal officer attached to the corporation is deemed as service on the institution and the holder of the office. It, therefore, follows that service upon Boniface Ireri, the Legal Clerk or Officer attached to the County Assembly can be deemed as proper service upon the Speaker and the Clerk of the County Assembly of Embu.

[30] In the appellants' affidavits they vehemently denied having been served personally or otherwise with the order dated 23rd January, 2014. They both contended that they only became aware of the said order when the application for contempt was filed; they however fail to state how they became aware of the said order. As noted by the trial Court, the appellants never denied that the secretary and Boniface Muthomi worked in the County Assembly of Embu or that the order was not served upon their offices. Further, the letter dated 28th January, 2014 written by the Registrar of the High Court in response to the Embu County Commander's query as to the authenticity of the order dated 23rd January, 2014 clearly demonstrates that the order was served upon the County Assembly Offices. They also did not state that the said order as was served upon Boniface Ireri was never brought to their attention. The 1st appellant merely averred that the order which was served upon **Boniface Ireri** did not bear the seal of the court, thereby raising doubt as to its authenticity and veracity hence incompetent and incapable of being acted upon. Just as the trial Judges posited we too are left wondering how the 1st appellant was able to determine that the order served did not bear the court seal unless the copy of the order served upon Boniface Ireri was brought to his attention. The foregoing raises doubt as to the credibility of the appellants contention that they were never served with the order and therefore lends credence to the conclusions drawn by the trial Judges that the appellants did not controvert the evidence in the affidavit of service and consequently, there was no need for the trial court on its own motion to have Mr. Nyamu cross-examined on the same.

[31] As set out in the affidavit of service, the service of the order was not made personally on the appellants as required under ***Rule 18.6*** of the ***Civil Procedure (Amendment No. 2) Rules 2012.*** What is the consequence thereof? ***Rule 18.8 (1)*** **of the** ***Civil Procedure (Amendment No. 2) Rules 2012*** provides for circumstances when the court can dispense with personal service of an order as follows:-

"1. In the case of a judgment or order requiring a person not to do an act, the court may dispense with service of a copy of the judgment or order in accordance with rules 81.5 to 81.7 if it is satisfied that the person has had notice of it—

a. by being present when the judgment or order was given or made; or

b. by being notified of its terms by telephone, email or otherwise".

Atkins Court Forms, Contempt of Court Volume 8 (2) at para 320, the learned commentators expressed themselves as herein below:-

"In the case of an application to commit for breach of an order, judgment or undertaking, the evidence supporting an application for committal must prove:

1. Personal service of the order, judgment or undertaking duly indorsed in with a penal notice. Where a person is required to do an act, service must be made before the expiry of the time limited for doing the act but where a person is required to abstain from doing an act, the court has a discretion, which may be exercised prospectively or retrospectively, to dispense with service of the order, judgment or undertaking, if the alleged contemnor has had notice of it;…".

Black's Law Dictionary, 9th Ed defines notice as-

"A person has notice of a fact or condition if that person-

- ***Has actual knowledge of it;***
- ***Has received information about it;***
- ***Has reason to know about it;***
- ***Knows about a related fact;***
- ***Is considered as having been able to ascertain it by checking an official filing or recording."***

[32] The trial court was correct in holding that the law as then was in contempt of court had since changed; the law as it stands today is that **knowledge** of an order is sufficient for purposes of contempt proceedings. The appellants herein had notice of the said order through service upon Boniface Njiru and out of what the 1st respondent referred to as "**abundant caution"** the same orders were advertised in the local daily

newspaper to notify all and sundry. The newspaper adverts as correctly pointed out by the trial court were merely notices to the public of the existence of the orders and not means of substituted service. In view of the circumstances of the matter, bearing in mind the time constraint, we agree the 1st respondent cannot be faulted for advertising the order in the local dailies without first seeking the leave of the court. Firstly, there was no time to seek leave, secondly personal service was attempted and the orders were served in the offices of the Embu County Assembly and the adverts in daily newspapers was meant to notify everybody including the appellants. We also find the argument that using the advert in the circumstances of this case without first obtaining the leave of the court was a nullity is a mere technicality.

[33] **Were the appellants in contempt of court?** The duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule of law and the due administration of justice. In ***Hadkinson –vs- Hadkinson, (1952) ALL ER 567,*** Romer, L.J. stated:

"It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, L.C., said in Chuck –vs- Cremer (1) (1 Coop. temp.Cott 342):

"A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it… It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid- whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it exists it must not be disobeyed."

Further, this Court in ***Refrigeration and Kitchen Utensils Ltd. –vs- Gulabchand Popatlal Shah & Another, -Civil Application No.39 of 1990 held,***

" … It is essential for the maintenance of the rule of law and good order that the authority and dignity of our courts is upheld at all times."

[34] The appellants argued that since the impeachment proceedings were taken out in the County Assembly proceedings the same was privileged by dint of the ***National Assembly (Powers & Privileges) Act*** and the ***Constitution***. Hence the trial court had no jurisdiction to entertain the contempt proceedings as against the appellants. In ***The Owners of Motor Vessel 'Lillian S' –vs- Caltex Oil Kenya Ltd., (1989) KLR 1,*** this Court held:

"Jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law downs its tools in respect of the matter before it, the moment it holds the opinion that it is without jurisdiction."

Section 17 of the ***County Government Act*** provides that the national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly. This provision invokes the application of the ***National Assembly (Powers & Privileges) Act*** .***Section 29*** of the ***National Assembly (Powers & Privileges) Act*** provides:-

"Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders".

[35] Members of Parliament and County Assembly can debate anything under the sun and this freedom of speech in the respective houses is unlimited except if prohibited by the respective Standing Orders. In ***Canada (House of Commons) –vs- Vaid, (2005) 1 S C.R*** at paragraph 42 the importance of parliamentary privilege was captured as follows:-

"Parliamentary privilege consists of the rights and immunities which the two Houses of parliament and their members and officers possess to enable them carry out their parliamentary functions effectively. Without this protection members would be handicapped in performing their parliamentary duties, and the authority of Parliament itself in confronting the executive and as a forum for expressing anxieties of citizens would be correspondingly diminished".

[36] Does this mean that the trial court had no jurisdiction to entertain the contempt proceedings? The High Court in ***Judicial Service Commission –vs- Speaker of the National Assembly & 8 Others, – Petition No. 518 of 201*** held as follows:-

"The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by Article 165(3)(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent or in contravention of the Constitution".

In the case of the ***Speaker of National Assembly –vs- De Lile MP & Another, 297/98 (1999) (ZASCA 50),*** Supreme Court of South Africa stated:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that the law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by and decree,

order or action of any official or body, which is not properly authorized by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from judicial scrutiny in such circumstances".

In ***Okiya Omtatah Okoiti –vs- Attorney General & 4 Others, – Petition No. 227 of 2013 consolidated with Petition No. 281 of 2013,*** the High Court at paragraph 57 held:

"In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two houses of Parliament and even those before the County Assemblies. It is however the mandate of this court to check the constitutionality of the resolutions and statutes made by the legislature. In the case before us, a resolution has been made and we have a duty to interrogate the constitutionality of that resolution".

[37] This Court in holding that the court has jurisdiction where constitutional issues are raised in respect of exercise of powers by constitutional organs in ***Peter Odoyo Ogada & 9 Others –vs- IEBC & 14 Others,*** quoted with approval the High Court decision in consolidated Constitutional ***Petitions No. 373 of 2012 & 426 of 2012- John Waweru Wanjohi & Others –vs- Attorney General & Others, Kipngetich Maiyo & Others –vs- the Kenya Land Commission Selection Panel,*** wherein it was held,

"The Court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments. The role of the court is to ensure that the fidelity of the Constitution is maintained".

[38] We are cognizant of the fact that there is a thin line between what was argued before us regarding the Parliamentary immunity and the jurisdiction of the High Court to issue orders of injunction. This is because on the one hand, the appellants claim that the orders were complied with, but on the other hand they seem to posit that the appellants could not be held in contempt because the proceedings of the Assembly are privileged. The circumstances that give rise to this whole saga need to be revisited and restated. The 1st respondent filed Constitutional Petition No. 1 of 2014 alleging that the impeachment proceedings were contrary to the Constitution and in violation of his fundamental rights. The High Court's jurisdiction under ***Article 165(1) (d) (ii)*** of the ***Constitution*** was activated. It is pursuant to that jurisdiction that the trial court issued the conservatory orders dated 23rd January, 2013 pending the determination of the constitutional issue. When a litigant approaches the High Court seeking remedies for alleged breach of fundamental rights, the Court is mandated to determine the grievances and issue orders as it may deem fit. We agree with the learned trial Judges those orders were supposed to be obeyed with utmost obedience until set aside or successfully appealed against. We hasten to restate as it has been done many times before that disobedience of court orders seriously undermines the rule of law. Every time a person or an institution especially a public officer disobeys a court order, there should be no celebration. A disobedience of a court order should be treated as a funeral, with compassion for the death of the rule of law. The appellants who prepared the order paper and presided over the proceedings of impeachment after having been served with the orders cannot conveniently claim immunity and at the same time claim to respect and obey the law.

[39] The terms of the order dated 23rd January, 2014 are as follows:-

> ***1. …….***
>
> ***2. Conservatory orders be and are granted restraining the 1st, 2nd and 3rd respondents (the 1st and 2nd appellants and the County Assembly herein) from holding any impeachment proceedings without having first served the applicant (the 1st respondent herein) with a notice containing specific grounds/ charges upon which the impeachment was being proposed and without giving him an opportunity to be heard.***
>
> ***3. The order will remain in force until 5th February, 2014 when the matter will be placed before the Resident Judge Embu for directions***.

The said orders are clear and unambiguous on what was required of the appellants. They were restrained from holding impeachment proceedings which included the actual debate and resolution to remove the 1st respondent from office until they served him with the charges labeled against him, they were also directed to afford him an opportunity to defend himself. The appellants had notice of the terms of the order as hereinabove discussed.

[40] There was no contestation that contrary to the orders issued, the appellants in utter disobedience thereto proceeded to table the motion of impeachment of the 1st respondent and it was passed on 28th January, 2014. The motion was passed after service of the order had been affected. It is not in dispute that the motion of impeachment was passed in utter disobedience of the court order; without serving the 1st respondent with the charges labeled against him; and without according him the necessary opportunity to defend himself. The apellants argued that they were not responsible for the disobedience of the order; they alleged that the order ought to have been directed upon Hon. Ibrahim Swaleh because he was the one who moved the motion for impeachment. In further support of their contention that they did not act in disobedience of the order, they argued that they neither moved nor voted on the motion. However this is what ***Article 178(2)(a)*** of the ***Constitution*** and ***Standing Order No. 24 of the County Assembly of Embu*** provides; that the Speaker shall preside at any sitting of the Assembly. While ***Standing Order No. 36*** provides that the Clerk is responsible for preparing the Order Paper which sets out the business to be placed before or taken by the County Assembly and the order in which it is to be taken.

[41] Based on the foregoing, it is the responsibility of the 1st appellant to preside over the business of the County Assembly and consequently, he ought not to have allowed debate of the motion on 28th January, 2014. The 2nd appellant is responsible for preparing the Order Paper and ought not to have included the debate of the said motion on 28th January, 2014 having had prior knowledge as demonstrated above of the order dated 23rd January, 2014. The appellants' actions were in willful disobedience of a lawful court order

The trial court correctly held,

"From the provisions of the Standing Orders cited above, it is clear that it is the responsibility of the Speaker of the County Assembly to preside over the business of the County Assembly. In addition, it is his duty to direct the Clerk of the County Assembly in the preparation of the order paper showing the business for each sitting day of the County Assembly. We therefore find that the Speaker of the County Assembly of Embu; Mr. Justus Kariuki Mate was the person who was in a position to ensure that the court order was observed given his role in the County Assembly. We have found that he allowed the motion, proposing the removal of the Governor from office to be debated and passed on 28th January, 2014 without complying with the Court order. Accordingly we find that Mr. Julius Kariuki Mate and the Clerk of the County Assembly of Embu, Mr. Jim Kauma acted in disobedience of the court orders and are therefore guilty of contempt of court".

[42] We think we have said enough to demonstrate why we have arrived at concurrent findings with the High Court Judges, that the appellants were aware of the Court orders issued on the 23rd January, 2014, that notwithstanding, they acted in utter disobedience of the same. Accordingly, we find no merit in this appeal which is dismissed with costs to the 1st respondent. The appellants should appear before the High Court at Kerugoya as it was ordered by the High Court. Since the date given by the High Court passed in view of the order of stay of execution issued by this court, the appellants are ordered to appear before the High Court at Kerugoya on the 6th October, 2014, at 9 am for further orders.

Dated and delivered at Nyeri this 30th day of September, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

J. OTIENO- ODEK

…..

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR