.REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CONSTITUTIONAL PETITION NO. 124 OF 2019

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 20, 22, 23, 25, 27,28, 41, 43, 47, 50, 73, 232, 236 & 258 OF THE CONSTITUTION OF THE KENYA

AND

IN THE MATTER OF THE PHARMACY AND POISONS ACT, EMPLOYMENT ACT AND THE PUBLIC SERVICE COMMISSION ACT & REGULATIONS

AND

IN THE MATTER OF: AN APPLICATION BY DR HEZEKIAH K. CHEPKWONY AND DR. PIUS WANJALA FOR ORDERS OF COMMITAL OR CONTEMPT OF JUDGMENT & DECREE OF COURT

AGAINST

MR. MUTAHI KAGWE, CABINET SECRETARY, MINISTRY OF HEALTH

BETWEEN

DR. HEZEKIAH CHEPKWONY .....1ST PETITIONER

DR. PIUS WANJALA.....2ND PETITIONER

DR. GEORGE WANG'ANG'A.....3RD PETITIONER

-VERSUS-

CABINET SECRETARY, MINISTRY OF HEALTH.....1ST RESPONDENT

PRINCIPAL SECRETARY, MINISTRY OF HEALTH.....2ND RESPONDENT

HON. ATTORNEY GENERAL.....3RD RESPONDENT

RULING

1. On 31.1.2020 this Court rendered Judgment in favour of the Petitioners, the Applicants herein, whose effect was nullify the deployment of the petitioners from the National Quality Control Laboratory (NQCL), for being in violation of the Constitution, Statute law and HR Policy and Procedure Manual for Civil Service. However, the court clarified that the respondents were at liberty to transfer/deploy the petitioners provided they complied with the Constitution, statute law and the terms of their contracts of service as contained in the HR Policy and Procedure Manual for Civil Service.

2. On 16.6.2020, the petitioners were served with letters dated 12.6.2020 by the 1st respondent, deploying them from the NQCL to Parastatals and directing them to report in their new stations on 17.6.2020. Aggrieved by the 1st respondent's decision, they filed the Notice of Motion dated 16.6.2020 seeking the following orders:

1. THAT for reasons to be recorded the Application herein be certified extremely urgent and be heard *ex-parte* in the first instance in

respect of prayers 1 to 4;

2. THAT this Honourable Court be pleased to grant a conservatory order to the Applicants herein by way of stay of operation of application of 1st Respondent's decision contained in letters Ref. No. 1999047895 and Ref. No. 1991082265 both dated 12.6.2020 transferring the Applicants from the National quality Control Medical Training College and Seconding them to Moi Teaching and Referral Hospital and Kenya Medical Training College respectively pending the hearing and determination of the Application.

3. THAT this Honourable Court be pleased to grant a temporary injunction restraining the 1st Respondent whether by himself, his officers, agents and/or servants or employees or any other State or government offices, officials or authorities from directly or indirectly maiming the Applicants and or discussing employment matters touching on the Applicants in the media pending the hearing and determination of this Application or further Orders of this Honourable Court;

4. THAT in view of the position taken by the Board of Management of National Quality Control Laboratory contained in its letters dated 8/6/2020 and 15/6/2020 to Hon. Mutahi Kagwe and its advert in the media on 6/6/2020 National Quality Control Laboratory to serve the orders granted herein through an advert in print media.

5. A declaration that the Hon. Cabinet Secretary, Mr. Mutahi Kagwe is in contempt of the Judgment and Decree of this Honourable Court made and delivered on 31.1.2020 by dint of his decision contained in the letters Ref. No. 1999047895 and Ref. No. 1991082265 both dated 12.6.2020.

6. Consequently, the Hon. Cabinet Secretary, Mr. Mutahi Kagwe be arrested and committed to civil jail for a period of six (6) months or such other period as the Court may determine for contemptuous disobedience of the Decree and Judgment of this Honourable Court made and delivered on 31.1.2020.

7. AN ORDER OF CERTIORARI to remove to this Honourable Court and quash the decision of the 1st Respondent contained in the letters Ref No. 1999047895 and Ref N0. 1991082265 both dated 12/6/2020 seconding the Applicants/Petitioners to other public bodies without the authority of the Public Service Commission.

8. AN ORDER for just compensation by the 1st Respondent to the Applicants/Petitioners for an amount or sum to be determined by the Court for contravention of their fundamental rights and freedoms enshrined in the Constitution thus injuring their feelings and dignity and exposing them to public ridicule, odium and prejudice.

9. THAT costs be provided for.

3. The application is premised on the following grounds:

a. That the 1st Respondent delivered Transfer/Secondment letters Ref No. 1999047895 and Ref N0. 1991082265 both dated 12.6.2020 on 16. 6.2020 at 2:00 pm purporting to second the Applicants (Director/CEO and Senior Deputy Director of NQCL) to Kenya Medical Training College (KMTC) and Moi Teaching and Referral Hospital (MTRH) respectively and requiring them to report by the following day , 17.6.2020 in blatant violation of section 42 and 43 of the Public Service Commission Act on Secondment and Transfers.

b. That it is impossible for one to be issued with a transfer and secondment letter at 2:00 pm in Nairobi mid-week and be required to report to a new public body far away at Eldoret and beyond the following day, particularly during this Covid-19 pandemic period where proper measures ought to be put in place.

c. That this Court, on 31.1.2020, delivered a Judgment and attendant Decree in the presence of Mr. Odukenya the State Counsel for the Respondents and the same served via email, whereby, in respect of the 1st Applicant, Dr. Hezekiah Chepkwony, the Court held that his purported transfer/deployment or replacement by Dr. Kandie was invalid for being done ultra vires, and further, awarded the him Kshs. 500,000 as compensatory damages for violation of his fair administrative action by the Respondents.

d. That the Court held that recommendation and approval for transfer/deployment of the 2nd Applicant, Dr. Pius Wanjala was done in violation of Court Orders in HC Misc. App. 31 of 2011 and Petition 124A of 2012. Hence the transfer/deployment was invalid for being in contempt of Court orders; while in respect of the 2nd Applicant, the court held that his deployment was in breach of Court orders in HC Misc. 131 of 2011 and Petition 124 A of 2012.

e. That the Court Orders in HC Misc. App 131 of 2011 and Petition 124A of 2012 are still in force and the impugned transfer decision by Hon. Cabinet Secretary Mutahi Kagwe is in contempt of those Orders in addition to the Judgment.

f. That whereas the Respondents lodged an appeal in the Court of Appeal against the Judgment in this Petition, they neither made an application for stay of execution of the judgment in this court nor do they hold any stay of execution of the foregoing judgment from the Court of Appeal.

g. That the Respondents did not follow the procedure laid down in the Judgment and or law as there is no evidence to prove that the Transfer was recommended by Ministerial Human Resource Management Advisory Committee (MHRMAC).

h. That in addition, the 1st Respondent's impugned decision was made without reference to the Board of Management of National Quality Control Laboratory, which is the appointing authority of the CEO/ Director of the Laboratory.

i. That the 1st and 2nd Applicants being Director/CEO and Senior Deputy Director of the National Quality Control Laboratory respectively, must of necessity make comprehensive handing over report of the institution to the Board of Management which will take sufficient time-weeks before being able to take up new assignment particularly having been seconded to different fully fledged state corporations.

j. That Section 20 (3) and (4) of the Public Service Commission Regulations 2020 provides that an officer shall be released to take up a new appointment within 60 days from the date of the decision to promote him. The Public Service Commission Act, 2017 solely vests the power of secondment of the public officer to the Public Service Commission.

k. That to prepare the ground for the disobedience of the valid Judgment of the Court and arbitrary transfer/secondment, the Respondents ran the widest most sophisticated hate campaign against the Applicants through Nation media – NTV television during 9:00pm and 7:00 pm prime time news on 30.5.2020 , 4.6.2020, 6.6.2020 and 16.6.2020 by falsely accusing them of having refused transfers, and that they are the rot and cartels of corruption in the Ministry of Health and have previously sued the Government.

l. That the NTV hate campaign was loudest against the 2nd Applicant as he was an Interested Party in support of Machakos High Court Petition No. 2 of 2019 where Odunga J on 26.9.2019 allowed the Petition by quashing appointment of Dr. Fred Siyoi as Registrar/CEO of Pharmacy and Poisons Board. The secondments were triggered by the decision of Odunga J. on 15.6.2020 of issuing a notice for Ruling of contempt application against Dr. Fred Siyoi which is likely to convict him and perhaps direct the police to forcefully remove him from office.

m. That the Board of Management of National Quality Control Laboratory met on 5.6.2020 and made a decision to put an advert on 6.6.2020 in the Nation newspaper, advising the media in particular Nation Media group to stop publishing falsehoods against the Applicants and further urged the media to verify facts with it prior to such publications but the Nation NTV has disregarded the plea.

n. That the Board in its letter dated 8.6.2020 requested the Cabinet Secretary for a meeting to address the falsehoods in the media. The Cabinet Secretary feigned ignorance and in his letter dated 10.6.2020 requested the Board to itemise the agenda for the meeting but instead he released the impugned transfer/secondment letters without reference or copy to the Board of Management.

o. That the Respondents have violated the Applicants fundamental rights and freedoms enshrined in Articles 10,41, 19, 20, 21, 27, 28,47, 50, 53, 73, 232 and 236 of the Constitution.

4. The Application is supported by the Affidavit of Dr. Pius Wanjala , the 2nd Applicant herein, sworn on 16.6.2020 on behalf of the 1st Applicant in which he reiterates the grounds set out on the body of the motion.

5. The 1st Respondent Hon. Mutahi Kagwe opposed the application vide his Replying Affidavit sworn on 22.6.2020 which also incorporated the Notice of preliminary Objection filed jointly by the respondents on 18.6.2010. According to him, the Judge erred in law and in fact in misinterpreting Prayer 2 of the Applicants' Notice of Motion and granting interim orders; and that the error by the Judge to differentiate between the terms of deployment vis-a vis transfer and or secondment is prejudicial and fatal to the Respondents' case.

6. He averred that the Applicants have mischievously worded prayers 2, 3, 6 and 7 of the application to mislead the Court that they are being transferred or seconded by the 1st Respondent while in actual fact the letters issued on 12.6.2020 indicated that they were deployed. He annexed as exhibits Payslips for June 2020 to prove that even upon deployment, the Applicants are still on the payroll of the Ministry of Health.

7. He averred that under Article 234 (5) of the Constitution of Kenya, the Public Service Commission may delegate in writing any of its functions and powers to one or more of its members or to any officer, body or authority in the public service; and that as the authorised officer, he is vested with the power to deploy officers within the ministry vide the authorization letter dated 20.4.2020 from the Public Service Commission.

8. He contended that the Judgment delivered on 31.1.2020 did not permanently shield the Applicants from disciplinary action and/ or deployment as long as the Applicants are employees of the Ministry, and averred that he effected the deployments in line with paragraph 54 (d) of the Judgment and applicable law thus he is not in contempt of Court.

9. He averred that during the Applicants previous period of employment at the National Quality Control Laboratory (NQCL), neither of them resigned or sought a transfer of service or release from the Ministry, therefore they still report to the Ministry by virtue of their employment and salaries and not to the Board of Management of NQCL. He further averred that the Board has also not protested the deployment/transfer and secondment.

10. He further averred that a cursory view of the Judgment delivered on 31.1.2020 reveals that the Applicants are public officers unlawfully holding two jobs in public service both as Deputy Chief Pharmacist in the Ministry of Health and as Director and Deputy Director at NQCL in violation of the public Officer Ethics Act, Employment Act, Leadership and Integrity Act and the Constitution of Kenya.

11. He contended that this Court erred by misinterpreting section 35 H of the Pharmacy and Poisons Act in making a finding that the Applicants are employees/appointees of the Board yet they are employees of the Ministry.

12. He contended that the Applicants' indiscipline belligerence and/or intransigence is a matter of common notoriety dating back from the year 2007 to date and have refused to be deployed from the NQCL. He further contended that the Applicants have thrived on misleading the courts, speculation and material non-disclosure to the extent that have been emboldened by various court interventions.

13. He averred that the Applicants' allegations of contempt of court is a choreographed scheme to further cover up on their unanswerable, unaccountability and headstrong defiance against him, the 1st Respondent.

14. He objected to the application contending that a contempt application is not a new suit as the Applicants have done, and opined that the new issues introduced should be the subject of a new suit. He further objected to the application before this Court on ground that it is *functus officio* since the Petition was heard and determined; that the application is *res judicata*; and that the Court lacks jurisdiction to hear and determine the application because the judgment in issue is the subject of an appeal pending before the Court of Appeal.

15. In response to the 1st Respondent's Affidavit, the 2nd Applicant filed a Supplementary Affidavit sworn on 23/6/2020 contending that the Board of Management of NQCL wrote a complaint letter to the Public Service Commission and the Head of Public Service through the Respondents complaining about their arbitrary transfer/deployment of officers from NQCL without replacements and the usurpation of its statutory mandate on appointment of Director/CEO without consultation, and further emphasized its wish to have the 1st Applicant conclude his 3 year contract.

16. He maintained that the 1st Respondent's response has not mentioned or annexed anything to demonstrate that the impugned transfers/deployments were subjected to MHRMAC, and contended that he does not see why the Respondents are labouring on distinguishing between deployment, transfer and secondment, and averred that the impugned "deployments" are secondments because public officers of parastatals like MTRH and KMTC are not civil servants employed by the Public Service Commission.

17. He contended that moving the 1st Applicant as a tutor to KMTC amounts to re-designation as defined under section 2 of the Public Service Commission Act.

18. He further contended that whereas the application to investigate whether the letters are in contempt of the Judgment/Decree of this Court, the Respondents elected to divert into immaterial issues of in-coordinated attempts to paint them as indiscipline officers without adducing any report from the CEO of NQCL, Board of Management of NQCL or even MHRMAC to support their speculative accusations.

19. Finally, he averred that the Respondents' ground of appeal in the Memorandum of Appeal confirm that they fully appreciate the import of the Judgment and Decree.

Applicants' submissions

20. The Applicants submitted that there was no MHRMAC meeting and the decision to transfer them disregarded the valid Decree and Judgment of this Honourable Court by violating section 43 of the Public Service Commission Act. They further submitted that the 1st Respondent was aware of the Judgment and the Decree of this court and relied on **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where the Court of Appeal held that knowledge of the judgment or order by the advocates of the alleged contemnor suffices for contempt proceedings.

21. They submitted that prior to issuing the transfer/secondment/ deployment letter dated 12.6.2020, the 1st Respondent did not contact the Board of Management or the 1st Applicant to discuss his contract as decreed in the Judgment.

22. They submitted that in **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** this Court held that, a Court punishes for contempt to safeguard the rule of law. They submitted that the 1st Respondent has not demonstrated that prior to his unilateral transfer of the 2nd Applicant he discharged the Decree/Orders in HC Misc. App. 131 of 2011 and Petition 124A of 2012.

23. They relied on the cases of **Fredrick Okolla Ojwang v Orange Democratic Movement & 2 Others [2017] eKLR** and **Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another [2005] 1KLR 828** where the courts emphasized that orders issued by court are binding and courts will not condone deliberate disobedience of its orders.

24. They submitted that the Notice of Preliminary Objection acknowledges that the impugned transfer is indeed secondment. They relied on Regulation 40 (4) of the Public Service Commission Regulations and submitted that their deployment, transfer or secondment drastically altered their contracts of employment to their detriment.

25. They submitted that the transfers shall cause hardship to them especially the 2nd applicant who has young children. In addition, the transfer is psychological torture t them as their skills are different from the stations they are being posted to. In conclusion, they submitted that the contemnor's action threatens the rule of law ushered by the Constitution and discourages motivated public servants.

Respondents' submissions

26. The Respondents submitted that the application is bad in law as the Applicants have not produced evidence that they extracted and served the Order and that they have not obtained leave to institute the claim.

27. They relied on the Court of Appeal decision in **Akber Abdullah Kassam Esmail v Equip Agencies Limited & 2 Others [2014] eKLR** finding that the Order had not been personally served upon the contemnor. They further relied on the case of **Nyamogo & another v Kenya Posts & Telecommunications Corporations** to urge that the principle is that the Order must be served upon the defendant personally.

28. They further submitted that the standard of proof in contempt proceedings is almost but not exactly beyond reasonable doubt as held in the case of **Mutitika v Baharini Farm Ltd (1985) KLR 229**.

29. It further relied on the case of **Rose Detho v Ratilal Automobile & 6 Others Civil Application No. 304 of 2006 (171/2006 UR)** where the Court of Appeal held that if the actions of the alleged contemnor in failing to obey court orders cannot impede the course of justice or make it difficult to ascertain the truth in respect of the matter, the contemnor can be heard.

30. They submitted that the Court is *functus officio* having rendered its Judgement on 31.1.2020, and as such entertaining the application would be tantamount to reopening the proceedings or sitting on appeal over its own judgment. They relied on the case of **Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 others [2013] eKLR** where the Court held that a court is *functus* when it has performed all its duties and that once proceedings are concluded the court cannot review or alter its decision.

31. They submitted the application is *res judicata* as a final decision was made in the suit and it is now the subject of pending legal proceedings in the Court of appeal, and hence the same cannot be subject to concurrent proceedings before this Court. They relied on **Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others [2010] eKLR** where the court held that the test in determining whether a matter is *res judicata* is if the matter is in issue in both suit, the parties are the same, sameness of titled and concurrent of jurisdiction and finality of the previous decision.

32. They further submitted that since the Court gave declaratory orders in the matter, if the Applicants are desirous of giving effect to the finding they need to file subsequent proceedings. They relied on the case of **Johana Nyokwoyo Buti v Wlaster Rasugu Omariba & Others Civil Appeal No. 182 of2006** where the Court of appeal held that a declaration or declaratory judgment is an order of the court that does not require anyone to do anything.

33. It was their submission that the deployment of the Applicants to their new stations was legal and is presumed to have been done legally as an administrative action is deemed to have been done within the law unless the contrary is proved. In support of this, they relied on the cases of **Raila Odinga v IEBC & 3 Others [2013] eKLR** and **Kiambu County Tenants Welfare Association v Attorney General & another [2017] eKLR**.

34. They submitted that the material non-disclosure by the Applicants that they have not been transferred and/or seconded but have *ipso facto* been deployed by the 1st Respondent, erroneously resulted in this court granting conservatory orders in prayer 2 contrary to Regulation 2 (1) of the Public Service Commission Regulations, 2020.

35. They submitted that they have demonstrated that the 2nd Petitioner does not have time to discharge his duties as Deputy Director as he practices in the firm of Masika & Koross Advocates. Further, the Applicants admit that they have separate 3 year contracts with NQCL and are not answerable to the 1st and 2nd Respondents.

36. They urged the Court to rely on the case of **Robert Nyabut Nyabwocha v Ronald Kiprotich Tonui & another [2016] eKLR** and find that the 2nd Applicant is conflicted and has vowed not to be deployed so that he continues holding 2 offices on full time basis. Finally, they urged the Court to decline any attempt to award the applicants damages and that dismiss the application with costs.

Issues for determination and analysis

37. The issues for determination are:

a. Whether the court lacks jurisdiction to entertain the application.

b. Whether the court is *functus officio*.

c. Whether the application is *res judicata*.

d. Whether the 1st Respondent is in contempt of the Judgment delivered on 31.1.2020.

e. Whether the Applicants are entitled to the Orders sought in the application.

Jurisdiction

38. The main issue in the instant application is whether the 1st Respondent violated the Judgment and the Decree of this court, issued on 31.1.2020. For that reason, I must hold without hesitation that the court has jurisdiction to deal with the said issue. The jurisdiction of the court to punish for contempt of court is vested by law, but it is also inherent to court by virtue of being a court of law. The said jurisdiction exists to ensure that the process of the court is not abused, and that its authority and dignity is upheld at all times. I gather support from **Woburn Estate Limited v Margaret Bashforth [2016] e-KLR** where the Court of Appeal Held that:

> **"The jurisdiction of the High Court (or for any other court for that matter) to punish for the violation of its orders cannot be in question. Apart from section 5(1) of the Judicature Act that vests in the High Court the power to, like those in the High Court of Justice in England, to punish any party who violates its orders, the court,by virtue only of being a court has inherent powers to make sure its process is not abused and its authority and dignity is upheld at all times."**

Functus officio

39. The respondents argued that the court is *functus officio* in this suit and cannot pronounce itself on the instant application. The said

doctrine deals with finality of proceedings. The Supreme Court, in the **Raila Odinga Case [Supra]** held:

> **"We, therefore, have to consider the concept of "functus officio," as understood in law. Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832, has thus explicated this concept:**
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> > **"The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.… The [principle] is that once such a decision has been given, it is (subject to any right of appea*l to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."***

40. In **Arthur Mathitu Nderitu & nother v Settlement Fund Trustees & 2 others; Fredrick Wan'gombe Nderitu & another (Proposed Interested Parties) [2019] eKLR** the Court held:

> **"The doctrine does not bar a court from entertaining a case it has already decided. What it does bar is a merit based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued meaning procedural interlocutory applications only.**
>
> **However, if it was a matter of correcting a clerical error or an incidental consequence of the final decision like execution proceedings or contempt of court proceedings, which would be possible under the Civil Procedure Rules, this doctrine is not applicable. I therefore find that this court is not functus officio in the contempt proceedings before it."**

41. The application before the court is not asking the court to reconsider the merits of its judgment but rather to enforce it by punishing the 1st respondent for failure to comply with it. To that extent,I find that this court is not *functus officio* with respect to the contempt proceedings.

42. However, the court notes that new and substantive prayers have been included in the application like Order of Certiorari to quash the letters for deployment dated 12.6.2020, and an Order for just compensation for contravention of their Fundamental Rights and Freedoms through defamation. I therefore agree with the respondent that the petitioners cannot be heard on the said new issues under the instant application because it would amount to reopening proceedings which have already been closed with finality.

Res judicata

43. The doctrine of *res judicata* exists to ensure that there is no multiplicity of suits and that litigations comes to an end. Section 7 of the Civil Procedure Act provides that:

> **"No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

44. The matters to consider in determining whether a matter is *res judicata* are that:

a. The matter in issue is similar in both suits;

b. The same parties are involved in both suits;

c. The claim is the same;

d. There is concurrence of jurisdiction;

e. The previous decision was final.

45. The main question in the instant application as noted above is contempt of this court's Judgment and the Decree. It is therefore as clear as the day that there is no sameness of the issues for determination in this application and petition. It is also clear that the issue of contempt has not been determined earlier in this suit or any other previous suit. This ground of objection must also fail.

Whether the 1st Respondent is in Contempt of Court

46. The Applicants' case is that the 1st Respondent is in contempt of the Judgment and decree passed by this Court on 31.1.2020 for reason that the 1st Respondent sent them letters of transfer/secondment dated 12.6.2020 to KMTC and MTRH. They contended that the procedure laid out on the Judgment was not followed as there is no evidence that the transfer was recommended by MHRMAC. It is also their case that the Judgment was delivered in the presence of Counsel Mr. Odukenya for the Respondents and also served via email.

47. The Respondents, on the other hand, contended that the Judgment did not permanently shield the Applicants from disciplinary action or deployment and that the Applicants misled the Court that they are being transferred and/or seconded by the 1st Respondent. They contended

that the application has not met the threshold for contempt proceedings since there is no evidence that the applicants extracted and served the decree herein.

48. I have considered the material presented to the court by both sides. The genesis of the contempt proceedings against the 1st Respondent is as a result of the Judgment delivered on 31.1.2020 where the Court granted several reliefs inter alia it held:

> **"d) For avoidance of doubt, the Petitioners maintain their current service and positions at the National Quality Control Laboratory without loss benefits and status until any intended deployment is done in compliance with the Constitution, statute law and the Human Resource Policies and Procedures Manual for the Public Service in force."**

49. It is trite law that the power to punish for contempt of court must be exercised carefully because of its potential to cost a person his/her liberty. It follows therefore that a certain threshold must be met before punishing for contempt, that is, there must be: -

a. Proof of personal service or knowledge of the decision, decree or order of the court on the contemnor;

b. Proof of violation of the decision, decree or order of the court by the contemnor; and,

c. Proof that the violation of the decision, decree or order was deliberate.

Proof of personal service or knowledge

50. In Kenya, contempt proceedings are governed by the law applicable in England at the time the proceedings are instituted. Under Rule 81. 5 of the English Civil Procedure (Amendment No.2) Rules 2012 provides that a Judgment/Order of the Court must be served upon the person required to do the act in question. However, the Court can dispense with such personal service under Rule 81.8 of the Rules which provides:

> **"(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.**
>
> **(2) In the case of any judgment or order the court may—**
>
> **(a)dispense with service under rules 81.5 to 81.7 if the court thinks it just to do so; or**
>
> **(b)make an order in respect of service by an alternative method or at an alternative place."**

51. The Judgment herein was delivered in the presence of Counsel Mr. Njuguna who held brief for Mr. Masika for the Applicants and Counsel Mr. Odukenya for the Respondents. Counsel being present in court, it is therefore sufficient to hold that the Respondents were aware of the Judgment. In **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR,** the Court of Appeal held:

> **"Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case." [Emphasis Added]**

52. Again in **Basil Criticos v Attorney General & 4 others [2012] e-KLR** Lenaola J (as he then was) held that:

> **"… the law has changed and so as it stands today, knowledge supersedes personal service and for good reason… where a party clearly acts and shows that he has knowledge of a court order, the strict requirement that service must be proved is rendered unnecessary."**

53. In ***Republic v Principal Secretary, Ministry of Defence Ex parte George Kariuki Waithaka [2019] eKLR*** the Court held:

> **"It is also notable in this regard that the counsel for the Respondent did appear in Court to defend the said application for contempt of court, and did seek time to pay the decretal sum. It is therefore evident from the pleadings and submissions made that the Respondent was aware of the orders of this Court of 13th July 2016."**

54. The 1st Respondent in paragraphs 14, 16, 17 his Replying Affidavit discussed the Judgment and stated that he complied with the Judgment. This is by itself a declaration that the 1st Respondent was aware of the Judgment delivered on 31.1.2020 and the implications thereto. Consequently, having gathered support from the foregoing precedents, I return that the Respondents' submission that there was no service is unfounded and is rejected.

Proof of violation of the judgment and decree

55. I must agree with the Respondents that the Judgment herein did not bar them from deploying and/or disciplining the petitioners. Indeed, the court clarified that deployment of the petitioners could be done but subject to the Constitution, relevant statutes and the HR Policies and Procedures manual for the Civil Service. The question that arises is whether the 1st Respondent complied with the said express directions in the said judgment.

56. To answer the said question, one must look at the background of the said direction from the preceding declarations and the petition. The court dealt at length discussing the position of the 1st Applicant who is the Director/CEO of the NQCL and an appointee of the NQCL Board of Management to serve the Laboratory under a 3 -years term. The said appointment is a statutory mandate donated to the BOM under section 35H of the Pharmacy and Poisons Act. The court noted that the decision by the Respondents to deploy the 1st Applicant to another institution before the lapse of his three years' term and replacing him with another person in that capacity was contrary to section 35H because it amounted to usurpation of the power of the NQCL Board. Consequently, the recommendation, deployment and replacement of the 1st Applicant was declared unconstitutional and a contravention of his fundamental rights and freedoms.

57. As regards the 2nd Applicant, the court noted that his deployment was in breach of court orders in HC Misc. App 131 of 2011 and Petition 124A of 2012 which were said to be still in force as at the time of the impugned deployment. Finally, as regards the 3rd petitioner, the court noted that his name was not part of the officers recommended for the deployment by MHRMAC and approved by the 1st respondent but it was added conspicuously by hand thereafter. Consequently, the court found that his deployment breached his contract as contained in the law and the HR Policy and Procedure manual for Civil Service.

58. From the foregoing background, it is clear that for the 1st Respondent to have complied with the Judgement and the Decree, he should have sought the consent of the 1st Applicant and consulted with the BOM of the NQCL to ensure that section 35 H of the Pharmacy and Poisons Act is not violated as it has a bearing on Article 236 of the Constitution which protects public officer from dismissal or removal from office without the due process of law. Again, the 1st Respondent was obligated by dint of section 43 of the Public Service Act and Section B31 of the HR Policies and Procedures Manual for the Civil Service to first secure a recommendation for the deployment from MHRMAC before even approaching the applicant or the BOM of NQCL.

59. The 1st Respondent did not adduce any evidence to prove that after the judgment and the decree herein was rendered, MHRMAC met and recommended for the deployment of the 1st applicant, and then he approved. Therefore, I find that the Respondent did not comply with the procedure as set out by statute and the HR Policies and procedure Manual for Civil Service and as pronounced in the Judgment.

60. As regards the 2nd Applicant, the circumstances are different from the 1st Applicant's position as the Deputy Director of the NQCL is not a direct appointee of the BOM of the NQCL in exercise of its mandate under section 35H of the Pharmacy and Poisons Act. His case mainly succeeded because there was breach of the Conservatory orders granted by the High Court almost ten years ago. It has not been shown how far the said suits have gone. I upheld the dignity and the authority of the court by declaring in my judgment that the deployment of the 2nd applicant contrary to the said Conservatory orders was unconstitutional, contrary to the rule of law and therefore invalid.

61. The new deployment should therefore again be viewed through the lenses of the said Conservatory orders given by the High Court and not the judgment herein. It follows that the 2nd Applicant should pursue his contempt of court proceedings against the 1st respondent in those other suits were the Conservatory orders were given.

Proof of deliberate violation of the judgment/decree

62. Having found that the 1st Respondent has violated the Judgment/ Decree rendered herein on 31.1.2020, it is necessary to consider whether he did so deliberately. In **Republic v Ahmad Abolfathi Mohammed & another [2018] e KLR** the Supreme Court held that:

> **"This power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the respondents to establish that the alleged contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order." [Emphasis Added]**

63. I have carefully read through the Replying Affidavit sworn by the 1st respondent in opposition to the contempt application and the following paragraphs where it was deposed: -

> **"14. THAT the judgment of 31st January, 2020 … did not permanently shield and/or bar the petitioners from disciplinary action and/or deployment as long as the petitioners are employees of the Ministry of Health.**
>
> **15. THAT I have exercised my powers as authorized officer in Ministry of Health by deploying different officers in their various stations taking to account their efficiency and effectiveness of the public service delivery, national integration and representation of Kenya's diverse communities.**
>
> **16. THAT … the deployments I have effected are in line with the judgment of this Honourable Court and the applicable law …"**

64. In my view, the language and the innuendos in the foregoing and other paragraphs in the Replying Affidavit by the 1st Respondent, it is clear that the deponent alleged that he was advised by his counsel on the import of Judgment.

65. The deliberate violation of the Judgment is evident as NQCL's Board of Management made efforts to address the issues relating to the Applicants. These efforts are demonstrated by the fact that the Board put up an advert on 6.6.2020 advising the media to stop publishing falsehoods against the Applicants and in its letter dated 8.6.2020, it sought to meet the 1st Respondent for a discussion on the media reports, its mandate, challenges and the way forward but no meeting took place.

66. I appreciate that the 1st Respondent has been and is highly engaged in addressing the Covid-19 situation in the country. However, it is clear to me that he deliberately violated the Judgment/Decree herein, and I so hold.

Whether the Applicants are entitled to the Orders sought

67. From the all the observations, and findings above, it is clear by now that the application by the 1st Applicant is allowed in terms of prayer (5) in the Notice of Motion dated 16.6.2020. I therefore make declaration that the Honourable Cabinet Secretary, Mr. Mutahi Kagwe is in contempt of the Judgment and Decree of this Court dated 31.1.2020 by his decision contained in the letter Ref: 1991082265 dated 12th June 2020 addressed to Dr. Hezekiah K. Chepkwony.

68. The prayer for committal to civil jail, will await the mitigations from the 1st Respondent either personally before the court, or through counsel on 23.7.2020 when the case will be mentioned online. In **Fred Matiang'i the Cabinet Secretary, Ministry of Interior and Co-ordination of National Government v Miguna Miguna & 4 others [2018] eKLR** the Court of Appeal held:

> **"When courts issue orders, they do so not as suggestions or pleas to the persons at whom they are directed. Court orders issue ex cathedra, are compulsive, peremptory and expressly binding. It is not for any party; be he high or low, weak or mighty and quite regardless of his status or standing in society, to decide whether or not to obey; to choose which to obey and which to ignore or to negotiate the manner of his compliance. This Court, as must all courts, will deal firmly and decisively with any party who deigns to disobey court orders and will do so not only to preserve its own authority and dignity but the more to ensure and demonstrate that the constitutional edicts of equality under the law, and the upholding of the rule of law are not mere platitudes but present realities."**

69. In this case , the contemnor alleged that the Judgment of the court was erroneous and has since appealed. However, the said Judgment/Decree has not been discharged or stayed and as such all the parties to the suit are bound by the same. I gather support from **Refrigerator & Kitchen utensils Ltd v Gulabchand Shah & others Civil Application No. Nai 39 of 1990** where the Court of Appeal held that:

> **"It was plain clear and unqualified obligation of every person against or in respect of whom an order was made by the court of competent jurisdiction to obey it until that order was discharged, and disobedience of such 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 purged his contempt. 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 or valid – whether it was regular or irregular… he should apply to the court that it might be discharged. As long as it exists, it must not be disobeyed."**

Conclusion and disposition

70. On the basis of material presented to the court by the parties, observations, reasons and findings I allow the application in the following terms:

a. That the Honourable Cabinet Secretary, Mr. Mutahi Kagwe is hereby cited for contempt of this court's judgment/decree dated 31.1.2020 for his decision contained in the letter Ref: 1991082265 dated 12.6.2020, deploying Dr. Hezekiah K. Chepkwony from the National Quality Control Laboratory to Kenya Medical Training College.

b. That for avoidance of any doubt, the offending letter Ref: 1991082265 and 1999047895 dated 12.6.2020 to the Applicants , are hereby declared invalid for being issued in contempt of the Judgment/Decree of this court dated 31.1.2020.

c. The 2nd Applicant is directed to file his contempt proceedings in the suits where he obtained the Conservatory orders upon which I acted to nullify his deployment in the said.

d. The case will be mentioned online for mitigation and sentencing on 23.7.2020 at 10.00 o'clock or soon thereafter when the 1st Respondent will be at liberty to attend in person or through counsel.

e. Each party shall bear his/her own costs of the application.

Dated, signed and delivered at Nairobi the 9th day of July 2020.

ONESMUS N. MAKAU

JUDGE