



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION 19 OF 2016

(Before Hon. Justice Hellen S. Wasilwa on 11th July 2019)

OKIYA OMTATAH OKOITL.....PETITIONER/APPLICANT

VERSUS

THE PRESIDENT OF KENYA.....1ST RESPONDENT

CABINET SECRETARY NATIONAL TREASURY.....2ND RESPONDENT

PUBLIC SERVICE COMMISSION.....3RD RESPONDENT

STATE CORPORATIONS ADVISORY COMMITTEE.....4TH RESPONDENT

THE HON. ATTORNEY GENERAL.....5TH RESPONDENT

AND

R. E. KIBWANA/JOSEPH KIBWANA.....1ST INTERESTED PARTY

WAMBUI NAMU.....2ND INTERESTED PARTY

ESTHER GICHERU.....3RD INTERESTED PARTY

FRANCIS PARSIMEI.....4TH INTERESTED PARTY

KENYA TRADE NETWORK AGENCY.....5TH INTERESTED PARTY

RULING

1. The Application before Court is the Applicant's Notice of Motion filed on 11th February 2019 seeking the following orders:-

1. Spent.

2. THAT the Court do order that the 1st, 2nd, 3rd, and 4th respondents are in contempt of Court and lack the right of audience in this Court until they purge the contempt.

3. THAT pending the inter-partes hearing and determination of this application, the Honourable Court do suspend the following gazette notices:-

1. GAZETTE NOTICE NO. 1037 dated 4th February, 2019 purporting to appoint JOHN NDEGE OBWOCHA, CATHERINE NJERI WAWERU, ALICE CHEPCHUMBA CHESIRE, FRANCIS KIRIINYA MWONGO, MOSES NDERITU GACHEMI and MESHAK KIDENDA to be members of the Board of National Transport and Safety Authority, for a period of three (3) years, with effect from 4th February, 2019.

2. GAZETTE NOTICE NO. 1038 dated the 31st January, 2019 purporting to appoint BERNARD NJIRU NJIRAINI to be the Managing Director of the Numerical Machining Complex Limited, for a period of three (3) years, with effect from January, 2019.
3. GAZETTE NOTICE NO. 1202 dated the 8th February, 2019, purporting to appoint KHADIJA M. AWALE to be the Chairperson of the Board of the Jomo Kenyatta Foundation, for a period of three (3) years, with effect from the 8th February, 2019.
4. GAZETTE NOTICE NO. 1203 dated the 8th February, 2019, purporting to appoint GEOFFREY NGOMBO MWANGO to be the Chairperson of Board of Directors of the Kenya Maritime Authority, for a period of three (3) years, with effect from the 8th February, 2019.
5. GAZETTE NOTICE 1204 dated 8th February 2019 purporting to appoint EZRA ODONDI ODHIAMBO to be an Executive Chairman of the Kenya Nuclear Electricity Board , for a period of three (3) years, with effect from the 8th February , 2019.
6. GAZETTE NOTICE NO. 1205 dated the 8th February 2019 purporting to reappoint SIMON N. GICHARU to be the Chairperson of the Rural Electrification Authority Board, for a period of three (3) years, with effect from the 8th February, 2019.
7. GAZETTE NOTICE NO. 1206 dated the 8th February 2019 purporting to appoint JOE MUTAMBU to be the Chairperson of the Water Resources Authority, for a period of three (3) years, with effect from the 7th February, 2019,
8. GAZETTE NOTICE NO. 1207 dated the 8th February, 2019 purporting to appoint JOSHUA IRUNGU to be the Chairperson of the Water Services Regulatory Board, for a period of three (3) years, with effect from the 7th February, 2019.
9. GAZETTE NOTICE NO. 1208 dated the 8th February, 2019 purporting to appoint GONZI RAI to be the Chairperson of the Kenya Fisheries Service, for a period of three (3) years, with effect from the 7th February, 2019.
10. GAZETTE NOTICE NO. 1209 dated the 8th February, 2019 purporting to appoint MARTHA MUTHONI WARIITHI and JACK CHEBET to be members of the LAPSSET Corridor Development Authority Board, for a period of three (3) years, with effect from the 8th of February, 2019.
11. GAZETTE NOTICE NO. 1210 dated the 8th February, 2019 purporting to appoint TITUS IBUI to be the Chairperson of the LAPSSET Corridor Development to be the Chairperson of the LAPSSET Corridor Development 16th of February 2019.
12. GAZETTER NOTICE NO 1212 dated the 8th February 2019 purporting to appoint PAUL TERGAT to be the Chairperson of the Kenya Academy of Sports Council, for a period of three (3) years, with effect from the 18th March, 2019.
13. GAZETTE NOTICE NO. 1213 dated the 8th February, 2019 purporting to appoint DAVID OLE NKEDIENYE to be the Chairperson of the National Water Harvesting and Storage Authority, for a period of three (3) years, with effect from the 7th February, 2019.
14. GAZETTE NOTICE NO. 1214 dated the 8th February, 2019 purporting to appoint OLGA KARANI to be the Chairperson of the Council of the Kenya Cultural Centre, for a period of two (2) years, with effect from the 8th February, 2019.
15. GAZETTE NOTICE NO. 1215 dated the 8th February, 2019 purporting to appoint NJUKI MWANIKI, (RTD) MAJOR GEN. to be the Non-Executive Chairperson of the National Youth Service Council, for a period of three (3) years, with effect from the 7th February, 2019.
16. GAZETTE NOTICE NO. 1216 dated the 8th February, 2019 purporting to appoint CYRUS KIBERA MAINA as the Chairman of the Betting Control and Licensing Board, for a period of three (3) years, with effect from the 8th February, 2019.
17. GAZETTE NOTICE NO. 1217 dated the 8th February, 2019 purporting to appoint SUSAN KIAMA to be a member of the Board of Kenya Airports Authority, for a period of three (3) years, with effect from the 8th February, 2019.
18. GAZETTE NOTICE NO. 1218 dated the 8th February, 2019 purporting to appoint PHILIP NDOLO and ROSINA NASIGHA MRUTTU to be members of the Board of Kenya Ferry Services Limited, for a period of three (3) years, with effect from the 8th February, 2019.

19. GAZETTE NOTICE NO. 1219 dated the 8th February, 2019 purporting to appoint JOHN CHANGWO CHEROGONY and RAHAB NJERI NYAGA (DR.) to be members of the Board of Kenya Railways Corporation, for a period of three (3) years with effect from the 7th February, 2019.
20. GAZETTE NOTICE NO. 1220 dated the 8th February, 2019 purporting to appoint DELILAH NGALA to be a member of the Board of the Kenya Ports Authority for a period of three (3) years, with effect from the 8th February 2019.
21. GAZETTE NOTICE NO. 1221 dated the 8th February, 2019 purporting to appoint MACHARIA IRUNGU (DR.), GEORGE O. ACHOKI (PROF.) and KEBENEI J. SELLAH (DR.) to be Commissioners of the Energy Regulatory Commission, for a period of three (3) years, with effect from the 8th February, 2019.
22. GAZETTE NOTICE NO. 1222 dated the 8th February, 2019 purporting to appoint JOSEPHAT NAMADA SIMANI and MWENDIA NYAGA to be members of the Board of the Geothermal Development Company Limited, for a period of three (3) years, with effect from the 8th February, 2019.
23. GAZETTE NOTICE NO. 1223 dated the 8th February, 2019 purporting to appoint EZRA ODONDI ODHIAMBO, KIPKORIR KOROSS GEOFFREY KIPTOO (DR.), JOSEPHINE ODIRA SINYO, TERESIAH MBAIKA MALOKWE, and STEPHEN MWANGI KARANJA to be members of the Kenya Nuclear Electricity Board, for a period of three (3) years, with effect from the 8th February, 2019.
24. GAZETTE NOTICE NO. 1224 dated the 8th February, 2019 purporting to appoint JOAKIM KIARIE KAMERE, MURAYA KARIUKI, LIZZIE CHONGOTI, PHILIP MONGONY, and GRACE WANJIRU NDUGU to be members of the Board of the Kenya Electricity Transmission Company Limited, for a period of three (3) years, with effect from 8th February, 2019.
25. GAZETTE NOTICE NO. 1225 dated the 8th February, 2019 purporting to appoint ALEX CHESOSI, BEATRICE KEMEI, NICHOLAS NGIKOR NIXON, BENARD BETT, BENSON K. KARIUKI, EZEKIEL WEYA, JOSEPHINE WACEKE MURITU, and GEORGE ONER OGALLO to be members of the Rural Electrification Authority, for a period of three (3) years, with effect from the 8th February 2019.
26. GAZETTE NOTICE NO. 1226 dated the 8th February, 2019 purporting to appoint SUSAN AAAINA, MILLICENT ONYONYI, and MAJ. RTD. ILTASAYON NEEPE to be members of the Board of Kenya Pipeline Company Limited, for a period of three (3) years, with effect from the 8th February, 2019.
27. GAZETTE NOTICE NO. 1227 dated the 8th February, 2019 purporting to appoint GATWIRI KARIMI to be a member of the Kenya School of Government Council, for a period of three (3) years, with effect from the 7th February 2019.
28. GAZETTE NOTICE NO. 1228 dated the 8th February, 2019 purporting to appoint DAVID MURIITHI GITHENDU, ALI SAHAL IDRIS, ADHAN NURI BERHE, NKATHA GICHUYIA (DR.), and VINCENT OMBAKA to be members of the National Youth Service Council, for a period of three (3) years, with effect from the 7th February, 2019.
29. GAZETTE NOTICE NO. 1229 dated the 8th February, 2019 purporting to appoint OMAR BOGA and GONZI RAI to be members of the Board of the Kenya Fisheries Service, for a period of three (3) years, with effect from the 1st February, 2019.
30. GAZETTE NOTICE NO. 1230 dated the 8th February, 2019 purporting to reappoint ERASTUS GATEBE (PROF) as the Chairman of the Radiation Protection Board, for a period of three (3) years, with effect from 8th February, 2019.
31. GAZETTE NOTICE NO. 1231 dated the 8th February, 2019 purporting to appoint ZEBEDEO JOHN OPORE, EDWARD MUSEBE (ENG.), STELLAH I. ONYIEGO (DR.), BEATRICE MARSHALL. DEE MUTISYA KIVUVA, JARED PETER ODOYO KWAGA and SIMON KAGIRI KAMATU to be members of the Board of the Kenya Institute of Mass communication, for a period of three (3) years, with effect from 8th February 2019.
32. GAZETTE NOTICE NO. 1232 dated the 8th February, 2019 purporting to appoint BENJAMIN K. AAAINGI (ENG.) to be a member of the Board of the Kenya Broadcasting Corporation, for a period of three (3) years, with effect from the 8th February, 2019.
33. GAZETTE NOTICE NO. 1233 dated the 8th February, 2019 purporting to appoint LAYI KHAMISI JABER to be a member of the Board of the Bomas of Kenya, for a period of three (3) years, with effect from the 7th February, 2019.
34. GAZETTE NOTICE NO. 1234 dated the 8th February, 2019 purporting to appoint ADAM ABDI JILLO, MOHANJIT SINGH BRAR, ALISON NGIBUINI, and KEN WAIBOCHI to be members of the Kenya Tourism Board, for a period of three (3) years, with effect from the 7th February, 2019.

35. GAZETTE NOTICE NO. 1235 dated the 8th February, 2019 purporting to appoint JOSEPH LEKUTON, LEONARD MUDACHI, ALPHONSE MAKAU KIOKO, GRACE WAMBUI NDERITU, ROSEMARY MUGAMBI, and DAVID STOGDALE to be members of the Board of Kenya Utalii College Council, for a period of three (3) years, with effect from the 7th February, 2019.
36. GAZETTE NOTICE NO. 1236 dated the 8th February, 2019 purporting to reappoint LUCY MAKUMBI MACRIDIS, JANE ADAM, and KAVINYA MWENDWA to be members of the Board of Kenyatta International Convention Centre, for a period of three (3) years, with effect from the 7th February, 2019.
37. GAZETTE NOTICE NO. 1237 dated the 8th February, 2019 purporting to appoint ELISHA KIPROP CHIRCHIR, SUSAN OGOLLA, CAROLINE E. NGANGA, STEVE GWENDO BIKO, and ABDUL HAKIM BALALA to be trustees of the Board of Tourism Fund, for a period of three (3) years, with effect from the 7th February, 2019.
38. GAZETTE NOTICE NO. 1238 dated the 8th February, 2019 purporting to appoint JANET MBETE, KENNETH K. KIPRONO, and CAESAR HANDA to be members of the Board of Tourism Research Institute, for a period of three (3) years, with effect from the 7th February 2019.
39. GAZETTE NOTICE NO. 1239 dated the 8th February, 2019 purporting to appoint KARANJA CHEGE KIRAGU (Eng.)—(Chairperson), GEOFFREY LEMISO, BEATRICE NJERI MAINA, SHEILA P. MUTUNGA, BEN OMONDI, and PETER IRUNGU KIHUNGI to be members of the Athi Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
40. GAZETTE NOTICE NO. 1240 dated the 8th February, 2019 purporting to appoint MUSTAFA SALIM IDDI—(Chairperson), JILLO ALEX KASE, SIMON MWACHIA, AMINA MNYAZI, MWALIMU DIGORE KITAMBI, and HIDAYA KASSIM MBWANA to be members of the Coast Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
41. GAZETTE NOTICE NO. 1241 dated the 8th February, 2019 purporting to appoint WAVINYA NDETI to be Chairperson of the Governing Council of Kenya Water Institute, for a period of three (3) years, with effect from the 7th February, 2019.
42. GAZETTE NOTICE NO. 1242 dated the 8th February, 2019 purporting to appoint JULIUS KONES (DR.) - (Chairperson), JOAN MAIYO, MANYALA KEAH, MEDIATRICE WANGIRA, ALFRED KHANGATI, DOUGLAS KIPLIMO TANUI to be members of the Lake Victoria North Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
43. GAZETTE NOTICE NO. 1243 dated the 8th February, 2019 purporting to appoint PAUL KIPCHIRCHIR BII—(Chairperson), WILLIAM ODUOL, VICTOR OMARE OMANWA, ERIK OKEYO, ROSEMARY ROP, and ANN MICHURA to be members of the Lake Victoria South Water Works Development Agency for a period of three (3) years, with effect from the 7th February 2019.
44. GAZETTE NOTICE NO. 1244 dated the 8th February, 2019 purporting to appoint BERNARD OTIENO OKEBE, GEOFFREY GITAU KAMAU (DR.), BANTICHA ABDULLAHI JALDESA, MONICA NAMUNYAK CHERUTICH, WANINGILO WALUBENGO, JANE MWIKALI, and ABDI DARA to be members of the National Water Harvesting and Storage Authority, for a period of three (3) years, with effect from the 7th February, 2019.
45. GAZETTE NOTICE NO. 1245 dated the 8th February, 2019 purporting to appoint SHABAN ALI ISAAK—Chairperson, MOLU HUGA ARBALE, SULEIMAN ALI GUFU, KHADIJA ABDULAH, RAPHAELLA LENTOIMANGA, ABDULKADIR HASHI HUSSEIN, to be members of the Northern Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
46. GAZETTE NOTICE NO. 1246 dated the 8th February, 2019 purporting to appoint ASMAN KAMAMA—Chairperson, NDERITU MATHENGE, JULIUS MURGOR, FRANCISCA KAMUREN, LORNA TIMANOI NKOIWA, PHILIP GICHUHI (ENG.) to be members of the Rift Valley Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
47. GAZETTE NOTICE NO. 1247 dated the 8th February, 2019 purporting to appoint WAHOME WILLIAM MWANGI—Chairperson, JOSEPH M'ERUAKI M'UTHARI, ANNE WANGECHI GITHINJI, MUTHONI P. NKOROI (DR.), DAVID NJAGI NGONGE, and WINNIE MWAI to be members of the Tana Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.
48. GAZETTE NOTICE NO. 1248 dated the 8th February, 2019 purporting to appoint KAKUTA OLE MAIMAI — (Chairperson), MUKINA KIVUVANI MAINGI, AGNES KAVINDU MUTHAMA, TITUS NGUMU, KIEMA MWANDIA, and KALEMBE NDILE to be members of the Tanathi Water Works Development Agency, for a period of three (3) years, with effect from the 7th February, 2019.

49. GAZETTE NOTICE NO. 1249 dated the 8th February, 2019 purporting to appoint PATRICK BAIYU, RAELE CHEBICHII LELEI, REV. SIMON KIUTA, ERIC WOKABI MUNGAI, JOHN KITILIT, ROSE NDINDA WAMBUA to be members of the Water Resources Authority, for a period of three (3) years, with effect from the 7th February, 2019.
50. GAZETTE NOTICE NO. 1250 dated the 8th February, 2019 purporting to appoint PATRICK O. KOKONYA-Chairman, UBAH ABDI IBRAHIM GEDI, ROSE MUGUCHU, MATTHEW TUITOEK, DOMINIC BIWOTT, JOYCE LAY, MWANIA MUSAU, to be members of the Board of Trustees of the Water Sector Trust Fund, for a period of three (3) years, with effect from the 7th February, 2019.
51. GAZETTE NOTICE NO. 1251 dated the 8th February, 2019 purporting to appoint ERIC KIPKOECH RUTTO (DR.), ESTHER NJOGU, IRENE WAITHERA KAMAU, KENNEDY ONDITI, EZRA RONO, and FAKIRA SHEIKH to be members of the Water Services Regulatory Board, for a period of three (3) years, with effect from the 7th February, 2019.
52. GAZETTE NOTICE NO. 1252 dated the 8th February, 2019 purporting to appoint THOMAS LEREMOE, FARAH ABDIKADIR MOHAMED, ANNE KALUKI OKETCH, MARGARET MUMBI MWANGO, ISAAK KAKA BORU, CHRISTOPHER NDEGWA, PAUL RUSHDIE RUSSO, ROBERT LEMERKETO, AHMED MOHAMED ABDI OGLE, ABDALLA HASSAN ABDALLA, NASRA IBREN, and AHMED IBRAHIM HAJI to be members of the Ewaso Ngiro North Development Authority, for a period of three (3) years, with effect from the 7th February, 2019.
53. GAZETTE NOTICE NO. 1253 dated the 8th February, 2019 purporting to appoint MOSES OLE SAKUDA, FARAH MANZOOR, PHILEMON LOTUDO, CONSOLATA ROP, SAMUEL KINYA RUKAHU, RORAT KISAIIKA SAAAMY, MABEL MURULI, TABITHA NJERI MURIGI, JOSEPH KIUNA NG'ANG'A, MOHAMUD MOHAMED AWALE, JACOB MACHARIA (HON), and DAVID KITASHO to be members of the Ewaso Ngiro South Development Authority, for a period of three (3) years, with effect from the 7th February, 2019.
54. GAZETTE NOTICE NO. 1254 dated the 8th February, 2019 purporting to appoint LENGURIS PAULINE, FRANCISCA ERENG, ANDREW NJENGA KARUMBO, ADAN OMAR, LEONARD SANG, GEORGE MURIUKI IRUNGU, JAMES KIPROP CHELANG'A (DR.), GRACE W. WERE, ERIC KIPKEMEI BETT, and SUSAN CHESIYNA to be members of the Kerio Valley Development Authority, for a period of three (3) years, with effect from the 7th February, 2019.
55. GAZETTE NOTICE NO. 1255 dated the 8th February, 2019 purporting to appoint AMIMO RODA MBANDU, PHILICE EMILY OKOTH, WILFRED MORIASI OMBUI, BHOKE CHRISTINE NCHAMAH, ELISHA KIPKORIR BUSIENEI, MARY SALLY KERRA, and FRANKLIN MUTAI RONO to be members of the Lake Basin Development Authority, for a period of three (3) years, with effect from the 7th February, 2019.
56. GAZETTE NOTICE NO. 1256 dated the 8th February, 2019 purporting to reappoint WAWIRE MAERO MICHAEL (DR.) to be a member of the Tana and Athi Rivers Development Authority, for a period of three (3) years, with effect from the 7th February, 2019.
57. GAZETTE NOTICE NO. 1257 dated the 8th February, 2019 purporting to appoint JOAN GITUMA, AGNES OLUOCH, and KATHERINE NDEREBA to be members of the Kenya Academy of Sports Council, for a period of three (3) years, with effect from the 7th February, 2019.
58. GAZETTE NOTICE NO. 1258 dated the 8th February, 2019 purporting to appoint ABU CHIABA MOHAMED, ERIC KINITI, TED MUTHUSI, FENNY W. S. MWAKISHA, NICHOLAS OLE MOIPEI, OLGA KARANI, MILLICENT OGUTU, WAITHAKA WAHENYA, FATUMA HASSAN, and FREDRICK B. J. A. NGALA (DR.) to be members of the Board of the Kenya Cultural Centre Council, for a period of three (3) years, with effect from the 25th January 2019.
59. GAZETTE NOTICE NO. 1259 dated the 8th February, 2019 purporting to appoint ELISHA KIBACIA GATU, FLEUR ARABELLE NG'WENO, and EPHRAIM WACHIRA WAHOME (PROF.) to be members of the National Museums of Kenya Board, for a period of three (3) years, with effect from the 7th February, 2019.
60. GAZETTE NOTICE NO. 1260 dated the 8th February, 2019 purporting to appoint MICHAEL MWANGI MUTHEE, ALFRED BAARIU (ENG.), and BENSON MWANGI to be members of the Sports Kenya Board, for a period of three (3) years, with effect from the 7th February, 2019.
61. GAZETTE NOTICE NO. 1261 dated the 8th February, 2019 purporting to appoint KENNETH THIMBA, MONI WEKESA (PROF.), KATHERINE MAUNDU, DOUGLAS WAKIIHURI, and ANGELA KOECH (DR.) to be members of the Anti-Doping Agency of Kenya, for a period of three (3) years, with effect from the 7th February, 2019.
4. THAT the Honourable Court do quash gazette notice numbers 1202 to 1210 and 1212 to 1261, dated the 8th February, 2019; Gazette Notice No. 1037 dated 4th February, 2019; and Gazette Notice No. 1038 dated the 31st January, 2019.
5. THAT such other or further orders as may be just be made to meet the ends of justice and to safeguard and protect the

authority and dignity of this Honourable Court.

6. THAT the Respondents herein be condemned to costs.

2. The application is based on grounds that on 31st January 2019 this Court delivered Judgment and ordered that all future appointments to Boards of States Corporations should be based on the law, on the Constitution and should be fair, open, competitive, merit based and through an inclusive process.
3. Further, that the Respondents have defied the order of this Court by handpicking and purporting to appoint individuals to be chairpersons and members of boards of state corporations and state agencies vide Gazette notice numbers 1202 to 1210 and 1212 to 12 61 dated 8th February 2019; Gazette Notice no, 1037 dated 4th February 2019 and Gazette Notice No. 1038 dated 31st January 2019.
4. It is a further ground that though the Applicant did not extract and serve the orders on the respondents, the judgment was read in open Court in the presence of counsel representing the Respondents and the respondents have since simultaneously appealed the judgement to the Court of Appeal and filed their application seeking to stay the said order.
5. The Applicant contends that orders do not have to be extracted and served for them to bind parties and that knowledge of Court orders is sufficient to form a basis for the finding of contempt of Court orders.
6. He further contends that the impugned purported appointments are unconstitutional having been made in contempt of this Court. In addition, the Respondents have power to only do things that are authorised by the law and anything not so authorised is both *ultra vires* and unconstitutional thus null and void.
7. The Applicant avers that the purported appointments being nullities *ab initio*, the affected individuals are not necessary to these proceedings. It is the Applicant's case that by defying the orders of this Court, the Respondents are in contempt of Court and therefore lack the capacity to address the Court until and unless the contempt of Court is purged.
8. Only the 4th Respondent filed a response to the application, in his Grounds of Opposition and a Preliminary Objection.
9. The Preliminary Objection is based on grounds that this Court has no jurisdiction to hear, determine and punish for contempt of Court in the absence of a statute defining what constitutes contempt of Court, providing for a procedure to be followed and prescribing the punishment for contempt.
10. Further, this Honourable Court did not issue any positive order capable of being disobeyed and that the Applicant did not extract or serve any order on the alleged contemnors and that the parties listed in the Judgment are different from the parties in the suit.
11. In his Grounds of Opposition, the 4th Respondent reiterated some of grounds raised in the Preliminary Objection. He however avers that that the issues raised by the Applicant are res judicata and should the Applicant seek to give effect to the Court's Orders in this matter he ought to file subsequent proceedings and not to seek further reliefs in the present suit.
12. The 4th Respondent avers that if the application is granted it would be contrary to the principles of natural justice and fairness as it will directly affect the 235 individuals named by the Applicant in his motion whose appointment he is challenging. According to the 4th Respondent the 235 individuals are presumed to have been legally appointed and the Applicant has not adduced any evidence to rebut that presumption.
13. He avers that the matters in issue are subject of active proceedings, before a three judge bench, in Petition No. 331 of 2016 Katiba Institute ad Africa Centre for Open Governance v Attorney General and the Public Service Commission.
14. He avers that the Applicant has admitted that he has neither extracted nor served the order in issue upon the Respondents therefore the Respondents cannot be presumed to be aware of the same.
15. It is the 4th Respondent's case that the 1st and 3rd Respondents are not corporate bodies and are therefore not capable of being sued. He avers that the application seeks to contravene the right to fair hearing of the alleged Contemnors contrary to the provisions of Article 50 of the Constitution.
16. The application was heard by way of written submissions and each party highlighted their respective submissions on 23rd May 2019.

Applicant's submissions

17. The Petitioner submitted that the obligation to obey Court order is universal, peremptory and unconditional. He relied on the Court of Appeal decision in **Fred Matiangi v Miguna Miguna Criminal Application No. 1 of 2018.**
18. The Applicant submitted that the Court delivered its Judgment on 31st January 2019 and the order issued was clear, unambiguous and unequivocal. It is the applicant's submission that the said order has never been stayed by this Court or by another Court of competent jurisdiction.

19. He submitted that though the orders were not extracted and served on the Respondents, they were aware or had sufficient notice of the Court order. He relied on the decision in **Basil Criticos v Attorney General [2015] eKLR** and **Justus Kariuki Mate v Martin Nyaga Wambora [2014] eKLR**.

20. He further relied on the case of **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** where the Court held:-

“...The notice of the order is satisfied if the person or his agent can be said to either have been present when the judgment or order was given or made; or was notified of its terms by telephone, email or otherwise. In our view, 'otherwise' would mean any other action that can be proved to have facilitated the person having come into knowledge of the terms of the judgment and/or order. This would definitely include a situation where a person is represented in Court by counsel. Once the Applicant has proved notice, the respondent bears an evidential burden in relation to wilfulness and mala fides disobedience. This Court in the Wambora case (supra) affirmed the application of these requirements.”

21. The Applicant submitted that the Respondents acted in contempt of Court as they did not make the appointments pursuant to the order of the Court and should therefore be punished as provided under Section 5 of the Judicature Act and Section 13 of the Employment and Labour Relations Act.

22. He submitted that the 2 main issues an Applicant has to show is that the order was disobeyed and that the Respondent had knowledge of the order. He further submitted that the factors to be taken into consideration when determining a contempt application were set out in the case of **Ringera and 2 others v Muite and 10 others**.

23. He submitted that the Respondents wilfully disobeyed the Court order with full knowledge and relied on the Supreme Court of India decision in **All Inida Anna Dravida Munnetra Kazhagam v L.K. Tiripathi and others S.I.P (C) No. 18879 of 2007**.

24. In submitting whether he had established the standard of proof in contempt proceedings, the Applicant argued that the Respondents had made false statements as to their knowledge of the order and their non-compliance with the Court order. He finally submitted that besides punishing the contemnors, the contempt must be purged by quashing the gazette notices.

4th Respondent's Submissions

25. The 4th Respondent in his submissions submitted that this Court lacks jurisdiction to hear and determine the application for reason that the jurisdiction of this Court has been provided under the Constitution and the applicable statute and the Applicant had not invoked any known jurisdiction of the Court to hear and determine the application.

26. The 4th Respondent submitted that there was no substantive law on contempt due to the declaration that the Contempt of Court Act was unconstitutional. It is therefore their submission that in such circumstances the Court cannot resort to common law as the provisions of the Judicature Act were repealed.

27. He submitted that the Applicant had admitted that he neither extracted nor served the order and that no leave was obtained to institute the application for contempt. He therefore submitted that the application is bad in law for non-compliance with the dictates of procedural impropriety that is designed to protect contemnors constitutional rights. He relied on the decision in **Akber Abdullay Kassam Esmail v Equip Agencies Ltd & 4 Others [2014] eKLR** and **Nyamogo & Another v Enya Post and Telecommunication Corporation**.

28. He submitted that the Court was functus officio having rendered its decision on 31st January 2019. Further, that the Petitioner prays that the Court does determine the issue on various appointments issued in the Gazette Notice dated 4th February 2019 is *factus officio* a fact admitted by the Applicant in response to the 4th Respondent's application dated 4th February 2019.

29. The 4th Respondent argued that the application is premised on an entirely new cause of action that was not before the Court which cause of action accrued after the delivery of judgment. He relied on the case of **Telkom Kenya Limited v John Ochanda (suing on his behalf and on behalf of 996 Former employees of Telkom Kenya) [2014] eKLR**.

30. In respect of the application being res judicata the 4th Respondent submitted that the Court had already pronounced itself on the issues raised by the Petitioner in its judgment of 31st January 2019 and that the finding and decision of this Court is a subject matter of pending legal proceedings before the Court of Appeal in Civil Appeal No. 51 of 2019. In buttressing the issue of res judicata the 4th Respondent relied on the decisions in **Henderson v Henderson (1843) 67 ER 313** and **E.T v Attorney General & Another [2012] eKLR**.

31. He submitted that the Court issued declaratory orders and that the orders have no coercive effect, which would require the Respondent to act on. He further submitted that there were no positive orders that are capable of being enforced. He relied on the decision in **Johana Nyokwoyo Buti v Walter Rasugu Omariba & Others**.

32. He submitted that an administrative action is deemed to have been done within the law unless the contrary is proved. Hence, the appointment of the 235 individuals was legal as the Applicant has not adduced any evidence to rebut the legal presumption. He relied on the Supreme Court decision in **Raila Odinga v IEBC & 3 Others Election Petition No. 5 of 2013**.

33. He submitted that the Applicant is seeking to introduce new parties to the proceedings who were neither served nor made aware of the proceedings and as such the grant of orders would be contrary to the principles of natural justice.

34. In conclusion he submitted that the this Court was informed of the pendency of proceedings touching on constitutionality of appointments in Petition 331 of 2016 and that this Court failed to determine the issue thus the decision of this Court was rendered incomplete and unreliable.

35. Further, since the 4th Respondent had challenged the jurisdiction of this Court in its Preliminary Objection and the Court neglected to determine the issue on its jurisdiction the decision of this Court was incomplete and unreliable.

36. I have considered the averments and submissions of the Parties herein. The issue for determination are as follows:-

1. *Whether this application is properly before this Court.*
2. *Whether the 1st and 3rd Respondents can be sued in this application.*
3. *Whether this Court is functus officio.*
4. *Whether the Respondents have committed acts of contempt.*
5. *What orders to grant in the circumstances.*

Issue No. 1

37. On this issue, the Respondent submitted that this application cannot lie because there is no law on contempt, the contempt of Court Act 2016 having been declared unconstitutional by this Court in **Constitutional Petition No. 87/2017 – KHRC vs Hon Attorney General & Law Society of Kenya.**

38. In order to properly understand this issue, I refer to The Interpretation and General Provisions Act, Cap 2 Laws of Kenya, which explains what transpires when an Act of Parliament ceases to exist. An act of Parliament may cease to exist through other means e.g. repeal. In such a case, the repeal will not affect any rights privileges, obligations or liabilities acquired. Reading into Section 23 of Cap 2, though the High Court declared the Contempt of Court Act unconstitutional.

39. The pronouncement did not affect any rights and obligations already accrued. This means Courts could still punish for contempt and in this case reliance would be on the previous law which existed before the pronouncement which in this case is the Law of England as previously applied. That being the position, it is my finding that this Court can still entertain this application without reliance on the impugned contempt of Court Act 2016.

40. On the 2nd issue, the Respondents submitted that the 1st and 3rd Respondent are not corporate bodies and are therefore not capable of being sued. The Respondent also submitted that the 2nd Respondent is an Independent Constitutional Commission and was not represented by the Office of the Attorney General. Indeed the Public Service Commission never participated in this Petition and it is not clear whether they were served by the orders of this Court and therefore no orders can be issued against the 2nd Respondent at this stage.

41. As for the 1st Respondent Pursuant to Article 143(2) the Constitution of Kenya 2010, proceedings shall not be instituted in any Court against the President or the person performing the function of that office during their tenure of office in respect of anything done or not done in exercise of their powers under the Constitution.

42. The issue of presidential immunity was discussed in the case of **Julius Nyarotho v Attorney General & 3 others (2013) eKLR**, where Gikonyo J held as follows:-

“I take the view that Article 143 of the Constitution protects a sitting President from legal proceedings. The Constitution has however, under sub-article (4) of Article 143, created an exception to the protection offered with regard to legal proceedings against the President for which the President may be prosecuted under any treaty to which Kenya is a party and which prohibits such immunity. In other words, except in those exceptions allowed under the law, a sitting President cannot ever be made a party to any legal proceeding in court. Any argument that would suggest a possibility of enjoining a sitting President as a party so that orders of judicial review can issue, to say the least, would be quite blind to the provisions of Article 143 of the Constitution. But it should be understood that the immunity in Article 143 of the Constitution only lasts for the time the President is in office”.

43. From the above, the President, Presidency and National Executive of the Republic means the same thing and thus no civil proceeding can be instituted against the President and Presidency during the terms of office.

44. As to this Court being functus officio, I note that in my judgement before this Court, I made declaratory orders as:-

“[12] More to the point, in my view, is the further question that now arises, which is whether the Court has any power to stay execution of a purely declaratory order. Although the word ‘execution’ is not defined in the CAR, it is, as Lord Denning MR observed in Re Overseas Aviation Engineering (G.B.) Ltd (1963) Ch. 24, 39, “a word familiar to lawyers...[which] means, quite simply, the process for enforcing or giving effect to the judgment of the Court”. This dictum is cited as authority for the definition, in almost identical terms, to be found in Halsbury’s Laws of England (4th edition, vol. 17, at para.401) and it clearly connotes, in my view, the setting in motion of some kind of process, directed at the party obliged by the terms of the judgement to give effect to it”

45. Declaration orders have been defined in various causes. Aburili J in Bitage Ndemo vs Director of Public Prosecution and 4 others (2016) eKLR held as follows:-

“A declaration is a formal statement by the Court pronouncing upon the existence of non existence of a legal constitutional state of affairs. It declares what the legal position is and what are the rights of the Parties. It does not contain an order which can be enforced against the Respondents, as it only declares what it the legal position. It is not a coercive remedy, and can be carefully couched or tailored so as not to interfere with the activities of public authorities more than is necessary to ensure that those public authorities comply with the law”

46. Declaratory judgements have no coercive effect and threatens no one. This was the position held by the SC of Nigeria in Chief R. A Okoya vs S. Santilli & Others:-

“It is not a matter of dispute before us that generally, Declaratory judgments and orders cannot be stayed. It is also a matter of general consensus among academic writers and in judicial decisions that a declaratory judgment which is an embodiment of the recognition of particular rights may be the basis for subsequent proceedings to enforce such rights, where such right is threatened or is being violated. It seems to me correct to postulate that a Declaratory judgment or Order is a recognition of a dormant right. Hence a declaratory order or judgment remains a dormant right until subsequent proceedings have been taken to protect the threat to or violation of the rights so declared in the judgment or Order. Until this is done there cannot be on the authorities as they stand, a stay of execution of the declaratory judgment or Order.

The expression "with liberty to apply" viz-a-viz the person in whose favour a declaratory judgment or Order is made is merely a hint to him that the Order is a ground on which subsequent proceedings to enforce the rights declared by the judgment if violated will receive enforcement. The judgement remains declaratory, and is not converted to an executory judgment by the enforcement.

In my opinion, there cannot be a stay of execution of a declaratory order or judgment. The contentions of Chief Benson for the Respondents has not shown that it is a conceptual possibility. A defendant who has filed an appeal against a declaratory judgment or order is not entitled to apply for a stay of execution of that judgment or Order. This is because a declaratory judgment or Orders has no coercive effect and threatens no one”.

47. Having made a declaratory judgement, I am unable to go beyond this and keep on checking whether the declarations are being enforced.

48. The Applicant would in the circumstances require to file fresh cause to ensure execution of the declarations so made. In the circumstances, I find myself functus officio as to the orders issued in this Petition and I find I am unable to issue any further orders. The application is therefore dismissed accordingly with no order as to costs.

Dated and delivered in open Court this 11th day of July, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Odukenya holding brief Mbilo for 4th Respondent/Applicant – Present

Petitioner – Absent