



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION NO. 8 OF 2019

(Before Hon. Lady Justice Maureen Onyango)

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 27, 41, 47 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTIONS 7, 22, 23 AND THE FOURTH SCHEDULE TO THE NATIONAL LAND COMMISSION ACT

AND

IN THE MATTER OF SECTION 13 OF THE EMPLOYMENT ACT

AND

IN THE MATTER OF CONVERSION OF TERMS OF EMPLOYEES FROM PERMANENT TO CONTRACT

AND

IN THE MATTER OF ABUSE OF POWER BY THE CHAIRPERSON OF THE NATIONAL LAND COMMISSION

-BETWEEN-

DR. SALOME MUNUBI.....1ST PETITIONER

DR. FIBIAN LUKALO.....2ND PETITIONER

FRANCIS MUGO.....3RD PETITIONER

LEONARD OMULLO.....4TH PETITIONER

VERSUS

PROFESSOR MUHAMMAD SWAZURI.....1ST RESPONDENT

CHAIRMAN, NATIONAL LAND COMMISSION....2ND RESPONDENT

VICE CHAIRPERSON,

NATIONAL LAND COMMISSION.....3RD RESPONDENT

AND

EMMANUEL BUSERA.....INTERESTED PARTY

AND

KABALE TACHE ARERO.....CONTEMNOR

RULING

The application before me for determination is dated 13th June 2019 and seeks the following orders –

- (1) That the Application be certified as urgent and service thereof be dispensed with in the first instance;
- (2) That the Court be pleased to issue summons to the following person to show cause why she should not be punished for contempt:
Kabale Tache – Acting Chief Executive Officer (CEO) of the National Land Commission (NLC)
- (3) That the person whose name appear in (2) above be committed to civil jail for a period of six months for contempt of court;
- (4) That the court be pleased to award costs of this Application to the Applicant.

The grounds in support of the application as set out on the face thereof and in the supporting affidavit of Dr. Fabian Lukalo, the 3rd petitioner in Petition 8 of 2019 are that –

- a. On 24th May 2019 this Court in its judgment decreed that “the contracts of all the petitioners be renewed according to the resolution of the Commission at its meeting on 8th May 2018, and the subsequent special meeting of the commission held on 13th December 2018 so that they do not become victims of the infighting among the Commissioners of the National Land Commission
- b. The said order required the person acting as the Chief Executive Officer of the Commission to circulate and implement it;
- c. The said order has not been set aside or varied;
- d. The Petitioners forwarded the Decree emanating from the said judgment to the person acting as the Chief Executive Officer of the Commission for implementation on 11th June 2019.
- e. The contemnor has expressly denied/vowed not to implement the said order of this Court;
- f. The 2nd and 4th Petitioners do not have access to their offices as the contemnor has closed and locked their offices with padlocks;
- g. The 2nd and 4th Petitioners are now forced to sit in a common pool space or any other available space they find at the contemnor’s offices;
- h. The 2nd Petitioner has had to conduct work-related meetings in other spaces such as the boardroom of the contemnor instead of her office;
- i. The contemnor has decline to process the Petitioners’ salaries for the month of May 2019, yet the rest of the staff have already been paid;
- j. The 1st and 3rd Petitioners are entitled to half-pay pending the hearing and determination of their respective cases at the Anti-Corruption and Economic Crimes Court.
- k. The contemnor’s failure to process the Petitioners’ salaries also means that their statutory deductions like NSSF, NHIF and Kenya Revenue Authority tax remittances have also not been paid which will attract fines;
- l. The contemnor’s failure to process the Petitioners’ salaries also means that they have defaulted on their other contractual obligations such as remitting loan repayments to commercial banks which has caused the Petitioners financial embarrassment and exposure to potential blacklisting by the Credit and Revenue Bureau;
- m. The 2nd and 4th Petitioners have been blocked from accessing the internal mailing system of the contemnor which is where they get their Kenya Revenue Authority P9 tax forms and access to the payroll system;
- n. The 2nd Petitioner has been denied transportation to conduct field study, the latest occurrence being her request to the contemnor

for a driver and hired vehicle for a work-related team visit to Taita Taveta University which was rejected, making it hard for the 2nd Petitioner to fulfil her work duties in relation to research;

- o. The conduct of the contemnor has expressly sought to undermine judicial authority;
- p. The dignity of this Court is now under peril;
- q. It is in the interest of justice that this instant Application should be allowed;

The application is opposed by the 2nd and 3rd respondents, the alleged contemnor and the Interested Party. The 2nd and 3rd respondents and the alleged contemnors filed a Notice Preliminary Objection and a replying affidavit of KABALE TACHE ARERO the alleged contemnor. The grounds in the preliminary objection are that-

1. Application contravenes the rights and fundamental freedoms of the Contemnor as it offends the provisions of Article 50(1) and (2); 250(12) and Article 252(1)(c) of the Constitution of Kenya. The alleged contemnor is the acting Secretary/CEO of the National Land Commission and is a stranger to the proceedings as she is not party to this petition. The National Land Commission's term ended on the 19th February 2019. The petitioners have not cited the respondents as contemnors in this matter.

2. The said Application is frivolous, vexatious and an abuse of the Court as it offends the provisions of Article 252(1) of the Constitution of Kenya which provides that "***Each commission, and each holder of an independent office (c) shall recruit its own staff; and (d) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.***"

3. The current application offends the provisions of Section 20(3) of the National Land Commission Act and is ambiguous as it relates to the alleged contemnor who is not a party to the proceedings. The Judgement dismissing the Petition and directing the issuance of contracts to the Petitioners is ambiguous against the alleged contemnor as there were no specific directives in the said Orders against the alleged Contemnor. The National Land Commission as per Article 253 of the Constitution is the only legal entity that can satisfy the judgement of the Court.

4. The Contempt Application against the alleged contemnor and the Orders sought thereof are untenable as the alleged contemnor is not served personally with the Judgement and Decree herein: - The alleged contemnor has not been served with the decree requiring her to take any action.

5. There is no proof of contempt against the alleged Contemnor.

In the replying affidavit of KABALE TACHE ARERO, she deposes that she is the Acting CEO/Secretary to the National Land Commission and is also the alleged contemnor. That she was informed about the judgment of this court by her counsel, that as a law-abiding citizen she would not disobey any court orders, that her understanding of the judgment is that it is against the 2nd respondent who is no longer in office, his term having ended on 19th February 2019.

She deposes that she has no authority to execute the judgment and decree of this court as her role and mandate under the Constitution, Human Resource Manual of the 2nd respondent and the National Land Commission Act do not mandate her to issue contracts of employment as her acting position is limited. That Article 252(1)(c) of the Constitution of Kenya and Section 22 of the National Land Commission Act give the Commission exclusive power to recruit/appoint its own staff.

The advocate for the Interested Party also filed grounds of opposition as follows –

- 1. The Applicants has not issued the notice required to be issued before the institution of contempt proceedings.
- 2. The Application as filed is not properly before court for failure to comply with mandatory legal requirements.
- 3. The subject Decree was not served on the Acting Chief Executive Officer in person as is required.
- 4. It was established during the hearing that the Commission is not properly constituted and thus the Commission is crippled and unable to do most of the administrative matters.
- 5. It is not the responsibility of the Acting Chief Executive officer to do the Staffing duties as required in the Court's decree and until the Commissioners are appointed by the President the Acting Chief Executive Officer will be unable to do most of the Staffing duties.
- 6. The application is fatally and incurably defective and the same ought to be struck out.
- 7. The application is incompetent and bad in law.

The Interested Party further filed a notice of preliminary objection in which it raises two grounds being –

1. That the Application is instituted contrary to Section 5 of the Judicature Act.
2. That the Application is fatally defective and should be struck out *in limine*.

The application was argued together with the preliminary objections.

Mr. Malenya for the petitioners/applicants submitted that both the judgment and orders were served upon the Acting CEO in person on 18th June 2019. He submitted that there has been no appeal against the judgment of this court nor has an application been filed to set aside or review that judgment.

It is Counsel's submission that the Acting CEO has wilfully disobeyed an order of this court for reasons that the alleged contemnor was not being asked to issue contracts to the petitioners but to implement contracts already issued by the Commissioner in the meetings cited in the judgment. He submitted that the reasons advanced by the alleged contemnor for not implementing the decision does not handle any weight. That the CEO is appointed under Section 20 of the National Land Commissions Act with her duties are specifically provided for under Section 20(3) and (4) of the Act. That more importantly, the alleged contemnor is the Acting CEO.

He referred to Section 2 of the Public Service Commission Act which defines acting appointments to entail the power to perform the duties of that public office other than the substantive office holder. That Section 2 of the Public Service Commission Act further defines an appointment to include an acting appointment. He further referred to Section 34 of the Public Service Commission Act, which he submitted is more elaborate. He submitted that the Public Service Commission Act binds the members of the National Land Commission as the National Land Commission Act does not make any provision for acting appointments. He submitted that in an acting capacity a person performs duties of that office.

Mr. Malenya further submitted that the decision of the National Land Commission bound it then and now. That the letters of appointment of the petitioners were not issued by the Chairperson of the Commission or the Commission but by the CEO. He submitted that at no point were the petitioners disengaged or terminated. That their purported termination when they insisted that they were on permanent and pensionable terms was suspended by this court.

Counsel submitted that this is not the first, but the third application for contempt in this matter. That the alleged contemnor has not even come to court to seek clarification of the judgment but has simply ignored it.

He submitted that the petitioners are Directors of National Land Commission and have not earned a salary from May 2019 although they have continued to report to work daily, the 2nd petitioner having to work from common rooms and the boardroom. That stoppage of their salaries meant that they are unable to meet their daily needs.

He submitted that in the case of the 1st and 3rd petitioners who are facing charges under the Anti-Corruption and Economic Crimes Act, the judgment did not stop the alleged contemnor from taking action against them. That the law prescribes what is to happen in their case, being that they stand suspended on half salary.

He submitted that the alleged contemnor has done nothing even after being served with the present application. That the dignity of this court has to be upheld by punishing alleged contemnors who disobey orders of this court wilfully.

He submitted that there is no question that the alleged contemnor was never served. That she is aware of the decision of this court and has instructed Counsel. That knowledge of proceedings and order amount to contempt where a person disobeys them.

He submitted that the power of this court to punish contempt is inherent and the court does not need to be moved as it can act on its own motion.

Mr. Okubasu for the 1st respondent supported the application on the basis that the 1st respondent was a party to the proceedings, even though he had not filed a reply to the application. He submitted that he would rely on the information given in the affidavit of the alleged contemnor. He observed and urged the court to take judicial notice that the National Land Commission is an ongoing institution and the fact that the Commissioners are not in force is not a convincing reason for disobedience of a decision of a court of law.

He further submitted that the alleged contemnor's contention that the National Land Commission is a stranger to these proceedings amounts to contempt on the face of the court. He submitted that the alleged contemnor tried to run away from these proceedings severally but was not allowed to do so. That the contention of the alleged contemnor that she has no authority to obey the court orders, or that there was no decree specifically directing her to implement the orders is the height of contempt. He submitted that there is no room to defer the court order to wait for a new Commission. That once a party is aware of a court order it must obey, appeal or file an application to explain the failure to obey.

He further submitted that the method used by the alleged contemnor, closing an office, asking an officer to sit in a public office, is very crude and insulting. That the salaries of the petitioners were stopped in May for a financial year that was ending in June 2019. He wondered who advised the CEO in May to stop the salaries and lock the offices of the petitioners. He submitted that court orders cannot be obeyed in a manner that hurts a public officer.

The Interested Party opposes the Application. Mr. Kibathi for the Interested Party submitted that contempt proceedings are in the nature of criminal proceedings and the applicant must be held to a very high standard of proof. That the applicant must strictly comply with the procedure as set out in the law for instituting contempt proceedings.

He submitted that following the declaration of the Contempt of Court Act unconstitutional, the applicable law is Section 5 of the Judicature Act. He submitted that the applicants have not complied with the same as the Attorney General has not been given notice of the intention to institute contempt proceedings, leave of the court was not sought and no proof has been given of service of the decree upon the alleged contemnor which the alleged contemnor has denied.

He submitted that the responsibility for staffing lay with the Commission, which is constituted of persons other than the alleged contemnor. That the applicants have failed to demonstrate that the alleged contemnor had notice of the decree, that she had capacity to apply the decree and that she has willingly refused to comply with the decree.

Ms Kanyiri, Counsel for the 1st, 2nd and 3rd respondents and the alleged contemnor opposed the application relying on the notice of preliminary objection dated 24th July 2019 and the affidavit of the alleged contemnor.

Aligning herself with the submissions of the Interested Party, Ms Kanyiri submitted that the contempt application contravenes Articles 50(1) and (2), 250(12) and 252(1)(c) of the Constitution. She submitted that the alleged contemnor is not party to the proceedings before the court, that is it the National Land Commission which is a party. She submitted that the alleged contemnor must get a fair hearing.

She submitted that there was no proper service upon the alleged contemnor or office of the Attorney General and no application for contempt against the National Land Commission to enable the office of the alleged contemnor to respond to the same. She relied on the case of **Vimalkumar Bhimji Depar Shah vs Bidco Africa Limited**, where at paragraph 94 Aburili J. stated –

... In contempt of court proceedings, parties have nothing else remaining. It is a complete proceeding that determines the guilt or innocence of an alleged contemnor. The outcome of contempt proceedings is a judgment and therefore a court of law ought not to render a judgment condemning a person without sufficient evidence being adduced as to the guilt of that person. In Linnet V Coles [1986] 3 ALL ER 652 page 656 to 657, letters s] St Lawton LJ stated that:

“Anyone accused of contempt of court is on trial for that misdemeanour and is entitled to a fair trial. If he does not get a fair trial because of the way the judge has behaved or because of material irregularities in the proceedings themselves, then there has been a mistrial, which is not trial at all. In such cases, in my judgment, an unlawful sentence cannot stand and must be quashed. It will depend on the facts of each case whether justice requires a new one to be substituted. If there had been no fairness or no material irregularity in the proceedings and nothing more than an irregularity in drawing up the committal order has occurred, I can see no reason why the irregularity should not be put right and the sentence varied, if necessary, so as to make it a just one.”

Ms. Kanyiri further submitted that an order must be couched in clear and unambiguous terms as was held by Yano J. in the case of **Abdalla Mugute –V- Moshin Bin Saleh and 3 Others**. She submitted that the role and mandate of the Secretary is limited by the Constitution and National Land Commission Act, that her work was to implement the contracts of the petitioners which had expired and were not renewed by the Commission. That the petitioners were never given termination letters.

She submitted that the decree as extracted and served does not contain any precise direction as stated in the decision in **Abdalla case**. That it does not provide any directive to the Acting Secretary in terms of satisfying the dispute. That she is aware the judgment was delivered in appreciation of the provisions of the Constitution and the Act.

She further submitted that there is no prejudice to be occasioned to the petitioners to wait for the recruitment of the Commissioners. That taking the Acting CEO through contempt proceedings in which her role is not defined is a mistrial.

Relying on the case of **Ileri V George Anyona and 3 Others**, she submitted that contempt proceedings are criminal in character. She further relied on the decision of Mativo J. in **North Tetu Farmers** where the Judge defined contempt and in the case of **Econet Wireless Kenya** in which it was observed that the standard of proof in contempt cases is proof beyond reasonable doubt.

Ms. Kanyiri prayed that the application be dismissed.

Determination

I have considered the application and objections as set out above together with the affidavits and submissions by the parties. I will treat the preliminary objections as grounds of objection to the application filed by the Applicants as the grounds raised in the preliminary objections have also been raised in the grounds of objection and in the replying affidavit and do not meet the threshold of a preliminary objection as set out in the case of **Mukisa Biscuit Manufacturing Co. Limited v West End Distributors Limited [1969] E. A. 696**.

The issues for determination are whether the applicants have approached the court properly, whether KABALE TACHE ARERO, the Acting CEO/Secretary to the National Land Commission, the alleged contemnor is in contempt of this court's judgment delivered by this court on 24th May 2019.

The alleged contemnor, the 2nd and 3rd Respondents and the Interested Party faulted the manner in which the Applicants have approached the court arguing that they did not comply with the Judicature Act. Section 5 of the Judicature Act was repealed by section 38 of the Contempt of Court Act 2016, which has itself been declared unconstitutional. By virtue of Section 20 of the Interpretation and General Provisions Act, a repealed law cannot be revived except by another law. The section provides as follows:

20. Repealed written law not revived

Where a written law repealing in whole or in part a former written law is itself repealed, that last repeal shall not revive the written law or provisions before repealed unless words are added reviving the written law or provisions.

It is my finding that in the absence of legislation on the manner in which parties should approach the court in contempt proceedings, the manner in which the Applicants approached the court cannot be faulted.

The next issue is whether KABALE TACHE ARERO, the Acting CEO/Secretary to the National Land Commission, the alleged contemnor is in contempt of this court's judgment delivered on 24th May 2019.

Blacks Law Dictionary (Ninth Edition) defines contempt of court as:

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

It is not in dispute that this court delivered judgment on 24th May 2019 in which it directed that the contracts of the petitioners be renewed according to the resolution of the Commission at its meeting of 8th May 2018 and subsequent special meeting held on 13th December 2018. It is further not in dispute that a decree was extracted and served upon Habiba, the Alleged contemnor's Secretary in the office of the Chief Executive Officer by Nornael G'Oganyo on 18th June 2019 as per affidavit of service sworn on 19th June 2019. There is another affidavit of Service sworn by Kelly Malenya, Advocate on 13th June 2019 in which he deposes that he served the decree dated 3rd June 2019 upon Habiba Galgalo the Secretary to the Alleged Contemnor on 11th June 2019. In her replying affidavit sworn on 25th July 2019 the Alleged contemnor confirms that –

“That I was informed by the Federation of Kenya Employers that judgment had been delivered on the 24th May 2019 dismissing the petitioner's petition and directing that the contract of all the petitioners be renewed according to the Resolution of the Commission at its meeting of 8th May 2018 and the subsequent special meeting of the Commission held on 13th December 2018.”

The Alleged contemnor has further not denied the averments in the affidavits of service that that Habiba is her secretary or that, as stated in the affidavit of Nornael G'Oganyo, Habiba entered her office and got her permission to receive the documents that he had been instructed to serve upon her.

There is no order staying execution of the judgement or decree. There is further no appeal or application for review of the Judgement and decree.

The acts that the Alleged contemnor is alleged to have committed which according to the applicants constitute acts of contempt of the said court orders are that she has refused to implement the orders in the decree dated 11th June 2019, has expressly defied/vowed not to implement the said decree, has denied the 2nd and 4th Petitioners access to their offices as she has closed and locked their offices with padlocks and forced them to sit in a common pool space of in or any other available space, compelling the 2nd Petitioner to hold work related meetings in the 2nd Respondent's Boardroom instead of her office. She is further alleged to have declined to process the salaries of the Petitioners, blocked the 2nd and 4th Petitioner's from accessing the internal mailing system of the 2nd Respondent and denied transportation to the 2nd Petitioner to conduct field study.

In her replying affidavit the alleged contemnor has not denied committing any of these acts. All she has said is that the Judgment was against the 2nd Respondent who was no longer in office as its term ended on 19th February 2019, that there was no specific decree against her, that her role and mandate under the constitution, HR manual of the 2nd Respondent and National Land Commission Act do not give her mandate to issue contracts of employment as her acting position is limited, that her role and mandate do not permit her to overturn the decision of National Land Commission which is mandated to recruit staff and she is not aware of any decree requiring the same of her, that she is unable to go beyond her mandate lest she becomes a victim of circumstances.

The Alleged contemnor did not attach any evidence of all that she averred to in her affidavit except a copy of the judgment and a printout of paragraphs 2.3 and 2.4 of page 8 of the National Land Commission Human Resources Manual. She did not provide the court with her letter of appointment to act as secretary/CEO of the 2nd Respondent or evidence of her role and mandate.

The National Land Commission Act does not provide for appointment of acting Secretary/CEO. However, Section 43 of the Interpretation and General Provisions Act provides that:

43. Powers and duties of holder of office

Where a written law confers a power or imposes a duty on the holder of an office as such, then, unless a contrary intention appears, the power may be exercised and the duty shall be performed by the person for the time being holding that office.

The Acting Secretary/CEO therefore has the mandate of the substantive Secretary/CEO according to Section 43 of the Interpretation and General Provisions Act. Under Article 250(12) the secretary of the Commission is the Chief Executive Officer of the Commission and under section 20(4) of the National Land Commission Act the Secretary/CEO is the accounting officer of the Commission and responsible for –

(4) The secretary, shall be the accounting officer of the Commission and shall be responsible to the Commission for—

(a) all income and expenditure of the Commission;

(b) all assets and the discharge of all liabilities of the Commission; and

(c) the proper and diligent implementation of Part IV of this Act.

The letters of appointment of the Petitioners are signed by the Chief Executive Officer. It is on record that by letter dated 30th November 2018 the Vice Chairperson of the National Land Commission directed the Acting Secretary/CEO to issue contracts to all directors of the 2nd Respondent including the Petitioners. The letter is reproduced below –

“OFFICE OF THE VICE CHAIRPERSON

TO: Acting Secretary/CEO

DATE: 30th November 2018

RE: EMPLOYMENT TERMS FOR NATIONAL LAND COMMISSION STAFF

My Memo Ref. NLC/GEN. Vol. VII (16) of 1st November 2018, on the above matter refers.

In the above mentioned memo, I communicated the decision the Commission made during a special meeting held on 8th May 2018. In that meeting the Commission renewed the employment contracts of all Directors and the Chief Executive officer/Secretary to the Commission, and placed all the other staff on Permanent and Pensionable terms. The contract of the CEO was for a further period of five (5) years as were those of the Directors, subject to them attaining the statutory retirement age of 60 years old

The Commission, during its meeting held on 23rd of November 2018 was shocked to realize that, contrary to its decision vide minute number 2nd May 2018; all Directors were placed on Permanent and Pensionable terms. The Commission confirmed that the terms were contractual and therefore directed that all letters communicating the contrary should be withdrawn with immediate effect. That order was communicated to you vide the memo I referred to earlier. To date, the Commission has not heard from you about the implementation of that resolution and the direction given by me on behalf of the plenary of the Commission.

You realize that in the absence of directors having an valid contract, and the declaration by the Commission that the Permanent and Pensionable terms given by the CEO are null and void, all heads of departments are in a very vulnerable position that does not auger well for their job security and morale.

In the light of this background, I on behalf of the Commission hereby direct you to take the necessary action to regularize employment status of all Directors as resolved by the lull plenary of the Commission. Towards that end the commission hereby directs you to prepare and deliver contractual terms to all directors, and withdraw or cancel their permanent and pensionable terms that were issued contrary to the decision of the Commission sitting in quorum, with immediate effect.

Kindly let us have the decision of the Commission implemented latest by close of business 3rd December 2018.

Kindly oblige.

SIGNED

Abigael Mbagaya Mukolwe (Mrs.)

VICE-CHAIR, NATIONAL LAND COMMISSION

CC: All Commissioners”

This is the decision that was affirmed by the Court in the Judgement. Even without this letter the Alleged contemnor did not need prior approval or authorisation of the Commission to implement a court order. She therefore had the authority of both the court by virtue of the judgment and of the Commission by virtue of the letter dated 30th November 2018, to issue the contracts to the petitioners as directed in the judgement. If she was in doubt, she ought to have sought clarification from this court as was held in the case of ***Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya and Another [2005] 1 KLR 828***. The refusal and or failure to do so therefore constitutes a disobedience of this court’s orders and therefore contempt of court.

As pointed out by Mr. Okubasu for the 1st respondent, the Alleged contemnor did not even bother to come back to court to explain why in her opinion she was not able to comply with the court order. She instead went on to intentionally lock out the 2nd and 4th Petitioners access to their offices by locking their offices with padlocks, blocked the 2nd and 4th Petitioner’s from accessing the internal mailing system of the 2nd Respondent and denied transportation to the 2nd Petitioner to conduct field study, all acts in furtherance of the contempt. She did not state who gave her authority to carry out these acts of contempt if as she alleges, she had limited authority in her capacity as acting Secretary/CEO. The court also wishes to note that this is not the only application for contempt against the alleged contemnor in this file but the third.

The objective of the law on contempt is to protect the dignity of the court and uphold the rule of law. A person who is served with a court order is supposed to move the court in a respectful manner to explain why they are unable to comply or to seek stay or setting aside of such orders. There is no other option available to a person who is served with a court order. You comply unless there is an order either staying or setting aside those orders. This is the nature of the authority of a court order. And the court must guard this authority and dignity jealously. If the court does not punish contempt it would be abdicating on its duty to maintain the rule of law and compromising the dispensation of justice. This is and has always been the case as reflected in the many decisions on the subject from various jurisdictions.

In the case of **Johnson Vs Grant, 1923 SC 789 at 790** Lord President Clyde sated that:

“...The law does not exist to protect the personal dignity of the judiciary nor the private rights of parties or litigants. It is not the dignity of the court which is offended. It is the fundamental supremacy of the law which is challenged.”

In **Econet Wireless Kenya Ltd v. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828** Ibrahim J. (as he then was) relied on the Court of Appeal decision in **Gulabchand Popatlal Shah & Another** Civil Application No. 39 of 1990 (unreported), where the Court of Appeal stated as follows:

“It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors... In HADKINSON v. HADKINSON (1952) 2 All E.R. 567, it was held that: 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 void.”

In **Attorney General v. Times Newspapers Ltd. [1974] A.C. 273**, Lord Diplock stated:

“...There is an element of public policy in punishing civil contempt, since the administration of justice would be undermined if the order of any court of law could be disregarded with impunity.”

The Court of Appeal in **A. B. & Another -V- R. B., Civil Application No. 4 of 2016 [2016] eKLR** cited with approval the Constitutional Court of South Africa's decision in **Burchell v. Burchell, Case No. 364 of 2005** where it was held:

“Compliance with court orders is an issue of fundamental concern for a society that seeks to base itself on the rule of law. The Constitution states that the rule of law and supremacy of the Constitution are foundational values of our society. It vests the judicial authority of the state in the court and requires other organs of the state to assist and protect the court. It gives everyone the right to have legal disputes resolved in the courts or other independent and impartial tribunals. Failure to enforce court orders effectively have the potential to undermine confidence in recourse to law as an instrument to resolve civil disputes and may thus impact negatively on the rule of law.”

Again in **B. -V- Attorney General [2004] 1 KLR 431** Ojwang, J (as he then was) stated that:

“The Court does not, and ought not to be seen to, make Orders in vain; otherwise the Court would be exposed to ridicule, and no agency of the Constitutional order would then be left in place to serve as a guarantee for legality, and for the rights of all people.”

Ndolo J. in **Teachers Service Commission v Kenya National Union of Teachers & 2 Others [2013] eKLR** observed that-

“The reason why courts will punish for contempt of court then is to safeguard the rule of law which is fundamental in the administration of justice. It has nothing to do with the integrity of the judiciary or the court or even the personal ego of the presiding judge. Neither is it about placating the applicant who moves the court by taking out contempt proceedings. It is about preserving and safeguarding the rule of law. A party who walks through the justice door with a court order in his hands must be assured that the order will be obeyed by those to whom it is directed.

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

The Supreme Court in **Republic -V- Ahmad Abolfathi Mohammed & Another** observed that –

“It is, therefore, evident that not only do contemnors demean the integrity and authority of Courts, but they also deride the rule of law. This must not be allowed to happen. We are also conscious of the standard of proof in contempt matters. The standard of proof in cases of contempt of Court is well established. In the case of Mutitika v. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

The rationale for this standard is that if cited for contempt, and the prayer sought is for committal to jail, the liberty of the contemnor will be affected. As such, the standard of proof is higher than the standard in civil cases. 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 wilfully acted in a manner that flouted the Court Order.

[30] The question that begs an answer, thus, is: did the applicant wilfully disobey this Court's Orders? The applicant showed the steps it took towards compliance with the Court Order. The deposition of Nyale Munga reveals the applicant's effort in complying with the Court Order. He avers that as the respondents were foreign nationals, only the National Police Service could ensure their security and protection. It was deposed that the applicant had a special responsibility: to ensure the security of the respondents, which could only be guaranteed by the Kenyan Government through the National Police Service, at the Anti-Terrorism Police Unit, until their eventual removal from the country, as there was no extradition treaty between Kenya and Iran."

It was correctly observed by Counsel for the Alleged contemnor and Counsel for the Interested Party that the burden of proof in contempt cases is above that in civil cases, almost but not to the degree of proof beyond reasonable doubt in criminal cases. In the present application the alleged contemnor has not denied carrying out the acts that the applicant alleges constituted the contempt.

On the issue of service I am guided by the Court of Appeal finding in **Shimmers Plaza Limited v. National Bank of Kenya Limited (2015) eKLR** where the court stated as follows:

"The dispensation of service under Rule 81.8 of the Civil Procedure (Amendment No. 2) Rules, 2012

(1) is subject to whether the person can be said to have had notice of the terms of the judgment or order. 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.

"We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect.

*"In that respect, this case can be distinguished from **Justus Kariuki Mate & Another vs Hon. Martin Wambora** (Wambora case) supra cited by learned counsel for the applicant.*

On the other hand however, this Court has slowly and gradually moved from the position that service of the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra).

*Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of **Basil Criticos Vs Attorney General and 8 Others [2012] eKLR** pronounced himself as follows:-*

"...the law has changed and as it stands today knowledge supersedes personal service.....where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary"

This position has been affirmed by this Court in several other cases including the Wambora case(supra).

*It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty. This standard has not changed since the old celebrated case of **Ex parte Langley 1879, 13***

Ch D. 110 (C.A), where Thesiger L. J. stated as follows. at p. 119:

"...the question in each case, and depending upon the particular circumstance of the case, must be, was there or was there not such a notice given to the person who is charged with contempt of Court that you can infer from the facts that he had notice in fact of the order which has been made" And, in a matter of this kind, bearing in mind that the liberty of the subject is to be affected, I think that those who assert that there was such a notice ought to prove it beyond reasonable doubt."

What then amounts to "notice"?"

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

“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.”

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.

“This is the position in other jurisdictions within and outside the commonwealth.

In addressing the issue whether service of a judgment or order on the solicitor for the Ministers is sufficient knowledge of the order on their part to found liability in contempt; the Supreme Court of Canada in *Bhatnager v. Canada (Minister of Employment and Immigration)*, [1990] 2 S.C.R. 217 at p. 226, LJ Sopinka, held that:-

“In my opinion, **a finding of knowledge on the part of the client may in some circumstances be inferred from the fact that the solicitor was informed. Indeed, in the ordinary case in which a party is involved in isolated pieces of litigation, the inference may readily be drawn.** In the case of Ministers of the Crown who administer large departments and are involved in a multiplicity of proceedings, it would be extraordinary if orders were brought, routinely to their knowledge, in such a case there must be circumstances which reveal a special reason for bringing the order to the attention of the Minister.”

(Emphasis added)

The Court went on to state that;

“On the cases, there can be no doubt that the common law has always required personal service or actual personal knowledge of a court order as a pre-condition to liability in contempt....**Knowledge is in most cases (including criminal cases) proved circumstantially, and in contempt cases inference of knowledge will always be available where facts capable of supporting the inference are proved.**(See *Avery v. Andrews*(1882) 51LJ Ch. 414)

(Emphasis added)”

The Alleged contemnor herein deposed at paragraph 3 of her affidavit that she was informed about the judgment of this court by her counsel. There are also two affidavits of service by Nornael G'Oganyo and Kelly Malenya, Advocate confirming that the decree was extracted and served upon Habiba, the Alleged contemnor's Secretary in the office of the Chief Executive Officer by Nornael G'Oganyo on 18th June 2019 as per affidavit of service sworn on 19th June 2019 and by Kelly Malenya, Advocate who in his affidavit of service sworn on 13th June 2019 deposes that he served the decree dated 3rd June 2019 upon Habiba Galgalo the Secretary to the Alleged Contemnor on 11th June 2019. These averments have not been denied or rebutted by the Alleged contemnor. I thus find that the Alleged contemnor was properly served and was also made aware of the orders by her advocate who was in court during the delivery of judgment.

Conclusion

From the foregoing I find that **KABALE TACHE ARERO** the Secretary/CEO was aware of the orders of this, was served with the decree and wilfully refused to comply with the same. I further find that she further locked out the 2nd and 4th Petitioners/Applicants in direct and wilful disobedience of this courts judgment delivered on 24th May and decree dated 3rd June 2018. I therefore find that the said **KABALE TACHE ARERO** is in contempt of the judgment and decree of this court.

The case will be mentioned on 11th October 2019 for mitigation and sentencing.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF OCTOBER 2019

MAUREEN ONYANGO

JUDGE