REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 194 OF 2018

IN THE MATTER OF: ARTICLES 10, 27, 28, 29, 41, 47 AND 236 THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF: SECTIONS 5, 45 AND 46 OF THE EMPLOYMENT ACT OF 2007.

AND

IN THE MATTER OF: SECTION 12 AND 13 OF THE COUNTY GOVERNMENTS ACT, 2012

AND

IN THE MATTER OF: SECTION 5,10,17,19,22,23 OF THE COUNTY ASSEMBLY SERVICE ACT, 2017

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 9 (2) (D) OF THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT 2017.

AND

IN THE MATTER OF: VIOLATION AND CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS GUARANTEES UNDER ARTICLES 10, 27, 28, 29, 41, 47, AND 236 OF THE CONSTITUTION OF KENYA, 2010.

BETWEEN

THE CLERK, NAIROBI CITY COUNTY ASSEMBLY.....PETITIONER

-VERSUS-

THE SPEAKER, NAIROBI CITYCOUNTY ASSEMBLY.....1ST RESPONDENT

NAIROBI CITY COUNTY ASSEMBLY SERVICE BOARD....2ND RESPONDENT

THE ORANGE DEMOCRATIC PARTY.....1ST INTERESTED PARTY

THE JUBILEE PARTY.....2ND INTERESTED PARTY

HON. ABDI HASSAN GUYO.....3RD INTERESTED PARTY

HON. MAURICE GARI.....4TH INTERESTED PARTY

HON. MARK NDUNG'U.....5TH INTERESTED PARTY

RULING

1. On 11.11.2019, the Petitioner filed a Notice of Motion dated even dated seeking *inter alia* to cite the 1st Respondent for contempt of the Consent Orders issued on 30th October, 2019 and served it on the respondents through their respective counsel. In response, the 1st respondent filed a Notice of Preliminary Objection dated 12th November, 2019 objecting to the said motion on the following grounds:

a. The application fatally offends Section 5 (1) of the Judicature Act, in line with the Court of Appeal holding in the case of **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] e KLR,** as the same is not an APPLICATION NOTICE pursuant to Rule 81.4 of the English Civil Procedure Rules as specified in mandatory terms, and therefore cannot be entertained.

b. Notwithstanding Objection No. 1 above, the mandatory prerequisites of a mandatory Notice of 7 days prior to the Hearing/ Return Date under Part 81 of the English Civil Procedure Rules, has been violated.

c. The Hon. Attorney General has not been served or enjoined, in the purported Contempt proceedings, the equivalent of the Crown office in Part 81 of the English Civil Procedure Rules, which is mandatory procedure.

d. A bona fide Contempt of Court threshold has not been met at all, to wit:

i. A certified Copy of the extracted Order allegedly contemned was not served personally on the 1st Respondent at all;

ii. The PERSONAL service of the Order upon the contemnor as mandate by Rule 81.8 of the English Civil Procedure Rules has not been proved;

iii. There is no Affidavit of Service of a duly licensed process server in proof of service of the allegedly contemned Order upon the 1st Respondent.

e. No leave was ever sought by the Petitioner/Applicant to give effect to Rule 81.1 (2) of the English Civil Procedure Rules on Contempt of Court to waive personal service of the Order on the Respondent.

2. The preliminary objection was argued in the open court on 29.11.2019.

Submissions in support of the Preliminary Objection

3. Mr. Kinyanjui, learned counsel for the 1st Respondent submitted that the application for contempt fatally offends Section 5 of the Judicature Act. He submitted that default position on contempt of court proceedings, after the nullification of the Contempt of Court Act by the High court, is as provided under section 5 of the Judicature Act. He observed that the motion is indeed brought under the said provision. According to the counsel, the application does not comply section 5 of the Judicature Act which provides that the procedure for applying for punishment for contempt of court is the one obtaining in the High Court of Justice in England at the time of making the application.

4. He further submitted that the application is incompetent because under Rule 81.4 of the of the Civil Procedure Rules of United Kingdom, the applicant must first file an application notice. He relied on several persuasive and also binding precedents to fortify the foregoing submission including, **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 Others [2014] e KLR** and urged the court to strike out the offending motion with costs because there was no application notice filed before the motion was filed as stipulated under Rule 81.4.

5. As regards the second ground, the counsel submitted that the Court of Appeal, in the said precedent, further held that the Application Notice must be served on the alleged contemnor. Accordingly, he submitted that, the application herein being brought under section 5 of the Judicature Act, the applicant was bound by the Court of Appeal decision. Consequently, he submitted that the application dated 11.11.2019 is incompetent because it is not in form of an application notice and the applicant did not serve the same on the respondents personally. He further submitted that the applicant never applied for waiver of personal service of the application on the respondents under Rule 81.6 the English Civil Procedure Rules.

6. As regards the law upon which the application is brought, the counsel submitted that the application is brought under section 28 (1) (g) of the Employment and Labour Relations Court Act (ELRC Act) which section does not exist. He further relied on **Daniel Kimani Njihia v Francis Mwangi Kimani & Another [2015] e KLR** and **Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR** where the Supreme Court held that the extraordinary standing of that Court demand that litigants must be clear on the jurisdiction they are invoking, especially by invoking the correct provision of the Constitution or statute. The court went on to hold that an omission in that regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution. The Court further found it sad for a party to rely on a repealed statutory provision to bring an application before it.

7. As regard the third ground of the objection, Mr. Kinyanjui submitted that ground is premised under Order 52 and Rule 81.6 of the UK Civil Procedure Rules. He contended that the application for contempt must be served on the Crown Office before filing. He contended that the Attorney General in Kenya is the equivalent of the Crown Office. He averred that the Attorney General was not served with the

application and he was not a party to the suit.

8. The counsel submitted that contempt proceedings are criminal in nature and as such, the application must be served upon the Attorney General. He urged that Section 5 (1) of the Judicature Act and the Court of Appeal in **Christine Wangari Gachege Case**, *supra* explained that the application must be served upon the Attorney General. To fortify the foregoing submission, he relied on **Anne Barongo v Awliyo Abdi Ahmed & 2 others [2015] eKLR**, **Charles Kagema Muraya V David Muthoka Mutangili[2012]eKLR** and **Buruburu Farmers Ltd v Joseph Kiongo & 2 Others [2012] eKLR.**

9. In the end the counsel urged the court to allow the Preliminary Objection with costs.

10. Mr. Miller for the 2nd Respondent, Ms. Mueni holding brief for Anzala for the 1st Interested Party, Ms. Oloo holding brief for Mr. Macharia for the 2nd Interested Party, Mr.Faraji for the 4th Interested Party and Mr. Njenga for the 5th Interested Party all joined submissions with the 1st Respondents in support of the preliminary objection and urged this Court to allow the same as prayed.

Submissions against the Preliminary Objection

11. Mr. Karanja learned counsel for the Petitioner submitted that a Notice of Preliminary Objection must be on purely points of law as enunciated by the **Mukhisa Biscuits case** unlike the position obtaining in the instant Preliminary Objection which does not raise pure points of law.

12. On the issue of leave to institute contempt proceedings Mr. Karanja referred this Honourable Court to **Christine Wangari Gachege Vs Elizabeth Wanjiru Evans & 11 Others (2014) eKLR** where the Court of Appeal opined that leave is not required where contempt proceedings relate to Judgment, order or undertaking as in the instant case. He contended that the alleged contempt is in relation to orders of this Court and therefore leave is not required in the circumstances.

13. On the issue of the Application Notice, the counsel submitted that the same is just a form that is to be filed by the Applicant. He in fact invited the Court to look at the case of **Kiru Tea Factory Limited Vs Stephen Maina Githiga & 14 Others (2019) eKLR** where the Application was brought by way of Notice of Motion as in the instant Application. He further urged this Honourable Court to be guided by Article 159 of the Constitution of Kenya, 2010 which provides that Courts should not dwell much procedural technicalities.

14. The counsel further submitted that an Application Notice is a form and not a pleading provided for in a statute and therefore the Applicant herein cannot be faulted for approaching this Court by way of Notice of Motion. He further contended that foreign laws should be modified to meet the domestic circumstances. To buttress this argument, the counsel cited the case of **Nyali Vs Attorney General (1956) Vol 2 QB page 1**. Consequently, he urged that the failure to approach the Court by way of Application Notice does not render the impugned application defective.

15. On the allegation of procedural lapses in the contempt Application, the Petitioner submitted that the same cannot be used to defeat substantive justice. He cited and relied on **Parbat & Company Limited Vs Kenyatta University (2000) eKLR** where the Court of Appeal held that it was not fatal for a party to misquote a provision of the law.

16. As regards service to the Attorney General, Mr. Karanja submitted that, failure to issue the notice is not fatal and relied on the Court of Appeal decision in the case of **William Kiprono Towett & 1597 Others Vs Farmland Limited** where it was held that misjoinder or non-joinder of a party is not fatal. He urged the Court to be guided by this Authority and hold that failure to join the Attorney General should not lead to striking out of the Application.

17. In conclusion, the counsel submitted that the Preliminary Objection as filed herein should be dismissed with costs to the Petitioner.

18. Mr. Theuri learned counsel for the 3rd Interested Party joined submissions with the Petitioner in opposing the Preliminary Objection herein and urged that the purposes of contempt of court proceedings is to protect the honour and dignity of the Court. He further submitted that in instances where there are gaps in the law by virtue of the Contempt of Court Act being declared unconstitutional, the same can be filled by the Court exercising its inherent jurisdiction to meet the ends of justice.

19. Mr. Theuri further contended that under Article 159 Courts should overlook procedural technicalities and do substantive justice. He further submitted that under the laws applicable in Kenya, an Application Notice is not recognized and therefore the Petitioner herein cannot be faulted for approaching the Court by way of Notice of Motion. He further submitted that the lack of the Application Notice does not in any way prejudice the Respondents.

20. As regards the issue of personal service, the counsel urged that the same cannot be determined under the Preliminary Objection as the same is to be determined at the hearing of the Application. Finally, the 3rd Interested Party's submission that the instant Preliminary Objection is un-meritorious and he urged this Honourable Court to dismiss the same with costs.

Rejoinder

21. In rejoinder, Mr. Kinyanjui submitted that this Court cannot invoke the court's inherent power to save the defective application. He submitted that in **Buruburu Farmers Limited Case,** the Court held that the oxygen rule cannot be invoked in contempt application since there is a specific procedure provided under section 5 of the Judicature Act.

22. He submitted that the case of **Parbat & Company Limited Vs Kenyatta University (2000) eKLR** is not applicable as it is a 2000

decision. He added that when Odunga J decided the **Buruburu Farmers case**, he was alive to the provisions of Article 159 of the Constitution.

23. He submitted that if the procedure is strict on the use of an application notice then a notice of motion should not be used. He maintained that the contempt proceedings are special proceedings and the procedure set out by the law must be strictly followed. He submitted that the application dated 11th November 2019 was fixed for hearing on 25th November, 2019 thus they were denied the right to respond within 7 days under the rules.

24. He submitted that the application for leave and the notice to the crown office are distinct. He contended that the Attorney General was not served because no affidavit of service was filed to prove personal service on the alleged contemnor and the Attorney General.

25. He sought to distinguish the instant case from **William Kiprono Towett case** by contending that the said case was not dealing with contempt of Court as the present case.

The issues for determination

26. The main issues for determination are:

a. Whether the objection meets the threshold for a preliminary objection.

b. whether the application dated 11.11.2019 offends section 5 of the Judicature Act.

Analysis and determination

(a). Whether the objection meets the threshold for a preliminary objection.

27. The threshold of a valid preliminary objection was set out by the Court of Appeal in **Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696** in the following terms:

> **"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."**

28. Applying the foregoing the foregoing binding precedent to the facts of this case, I find that ground 1,2 and 3 of the objection are pure points of law which are capable of disposing of the impugned application *in limine* if successfully argued. However, the ground 4 and 5 of the objection go to the merits of the application for committal and obviously requires evidence to prove the same. Consequently, I will determine ground 1,2 and 3 of the objection which I have collapsed into the second issue for determination above.

(b) whether the application dated 11.11.2019 offends section 5 of the Judicature Act.

29. I agree with Mr Kinyanjui that after the nullification of our Contempt of Court Act, we reverted to Section 5 of the Judicature Act as the law under which to punish for contempt of court. The said section provides as follows:

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

30. Courts in this country have unanimously agreed that the foregoing provision puts an obligation on the litigants, their lawyers and the courts to verify the prevailing procedure for instituting contempt proceedings in the High Court of Justice in England when dealing with such applications. In **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR** the Court of Appeal held that, by dint of section 5 of the Judicature Act, the procedure of instituting contempt of court proceedings in Kenya is set out in PART 81 of the Civil Procedure of the UK which entirely replaced Order 52 of the Rules of the Supreme Court England (RSC) through the Civil Procedure (Amendment No.2) Rules of 2012. The court observed that the repealing of the said Order 52 brought certain changes in the procedure for bringing contempt applications which are relevant to the objection herein.

Application Notice

31. The first ground of the objection by 1st Respondent is that the application dated 11.11.2019 is incompetent because under PART 81.4 of the English Civil Procedure Rules, the Petitioner herein ought to have filed an Application Notice and not a Notice of Motion to institute contempt proceedings. However, the Petitioner and the 3rd Interested Party submitted that in Kenyan civil procedure, Application Notice is unknown and urged that the foreign law should be applied with modification to suit the local circumstances. They submitted that Article 159 of the Constitution requires that the court should administer justice without undue regard to procedural technicalities.

32. I have perused PART 81.10 of the English Civil Procedure (Amendment No. 2) Rules 2012 whose heading is, ***'How to make the Committal application'***. It provides:

> **"(1) A committal application is made by an application notice under Part 23 in the proceedings in which the judgment or the order was made or the undertaking was given.**

(2) where the committal application is made against a person who is not an existing party to the proceedings, it is made against that person by an application notice under Part 23.

(3) the application notice must–

(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged acts of contempt; and

(b) be supported by one or more affidavits containing all the evidence relied upon.

(4) subject to paragraph (5), the application notice and the evidence in support must be served on the respondent.

(5) the court may-

(a) dispense with service under paragraph (4) if it considers it just to do so; or

(b) make an order in respect of service by alternative method or at an alternative place."

33. An application notice is defined under Rule 23.1 of the said English Civil Procedure Rules as a document in which the applicant states his intention to seek a court order. In view of the description given under Part 81.10(3) above, an application notice in England is the equivalent of Notice of Motion in Kenyan. Under both Civil Procedure Rules, 2010 and the Employment and Labour Relations Court (Procedure) Rules, 2016, the recognized form of applying any order is basically a Notice of Motion, which may be supported by an affidavit or affidavits if evidence is required to support to it. Other forms like Chamber summons are only used where there is a specific provision like application for leave to apply for Judicial Review orders under Order 53 of the Civil Procedure Rules. The same position obtains in the Court of Appeal and the Supreme Court whenever a person intends to move the courts for any orders.

34. The description of a notice of application is worth repeating here:

"(3) the application notice must–

(a) set out in full the grounds on which the committal application is made and must identify, separately and numerically, each alleged acts of contempt; and

(b) be supported by one or more affidavits containing all the evidence relied upon."

35. The court must in the circumstances of this case chose between whether to stop at the traffic red light of procedural technicalities, or walk down the path of substantive justice by interpreting the said English Rules of procedure through the lenses of Article 159 of our Constitution and the law as requested by the applicant herein. It is trite that courts exist to do justice and as such, I will take the latter option of substantive justice as opposed to procedural technicality since there is no demonstrable prejudice. I agree that foreign law, even where it is expressly imported, it ought to be applied with the necessary modification to suit the local circumstances including the known forms used in invoking the relevant jurisdiction of court.

36. Having said that, I must distinguish the facts of this case from that in **Christine Wangari Gachege v Elizabeth Wanjiru Evans & 11 others [2014] eKLR.** In the said case, the application for before the Court of Appeal was for leave to file contempt proceedings for alleged breach of a court order and the issue was whether such application should be heard by a single judge. The application was placed before a three judge bench which held that:

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

37. It is clear that the Court of Appeal was dealing with an application for leave and not the substantive application for committal unlike the instant motion. Likewise, the Court of Appeal was never invited to determine whether filing a notice of motion as the form for initiating contempt proceedings, as opposed to application notice was fatal. In my view the priority of the Court of Appeal in the said case was to explain to the parties about the new procedure, in England, for instituting contempt proceedings for breach of judgment or order made or an undertaking given. In the end the Appellate court dismissed the application because it was not required under the new Rules and not because of want of form.

38. I believe the Court of Appeal would not dismiss the application for want of form because it is very much aware of the principles of administration of justice set out under Article 159 of the Constitution and also the policy set out under Order 51 rule 10 of our Civil Procedure Rules. The Rule 10 provides that:

"(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be

stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule.

(2). No application shall be defeated on technicality or for want of form that does not affect the substance of the application."

39. In the instant case the applicant filed a notice of motion seeking several orders *inter alia* that the 1st Respondent be committed to jail for contempt of court. The Application sets the grounds on which it is premised and further numerically states each contempt allegation and the dates when the actions were committed. The motion is supported by an affidavit which contains all the evidence concerning the acts of contempt of court committed by the respondents. Consequently, I see no offence to the law, no deficiency in the content or any prejudice occasioned to the respondents by the use of notice of motion as opposed to application notice. It has not been demonstrated that the use of notice of motion as opposed to application notice as the form of bringing the application affects the substance of the application.

40. Putting into consideration all the materials presented to me by the parties, I am clear in my mind that the objection by the 1 st respondent on this point is mainly the form used to approach Court for contempt proceedings as opposed to substantive law regarding the power of the court to punish for contempt of court to uphold its authority and dignity. Consequently, and in view of my earlier sentiments, I find that it is in order for contempt proceedings to be made by a notice of motion in Kenya, like in this case because it has the same form and substance as an application notice in England.

Application ought to be served upon the Attorney General

41. Mr. Kinyanjui argued that the application for contempt must be served upon the Attorney General who is the equivalent of the Crown Office. In his view the basis for serving the application on the attorney general is because a person's liberty is at stake. However, the applicant contended that leave was not required before bringing the instant application and as such urged that notice to the Attorney General before filing the contempt proceedings was not required.

42. As observed herein above, the amendment to the English Civil Procedure Rules introduced far reaching consequences by repealing Order 52 including abolition of the requirement of leave before bringing committal proceedings related to a breach of judgment or order made or an undertaking given. Accordingly, the requirement that the Crown Office be served with a notice of the application for leave at least one day before moving the court was abolished. Consequently, the 3rd ground of the objection also fails.

43. The foregoing view is fortified by **Sam Nyamweya & 3 others v Kenya Premier League Limited & 2 others [2015] eKLR** where Aburili, J held:

"Coming back to our issue of whether notice to the Crown (DPP) was necessary, the aforementioned provisions left out the requirements of notice to the Crown office (read the Attorney General or DPP) prior to filing an application for contempt as was previously required under order 52 of the said Supreme Court of England Rules. It therefore follows that no such notice to the DPP was necessary in this case."

44. The facts of the instant application are also distinguishable from those in **Buruburu Farmers Ltd v Joseph Kiongo & 2 Others [2012] eKLR** where the court upheld a similar objection after it found that the applicant had failed to serve the Attorney General with a notice of intention to apply for leave at least on day before filing and only served the notice 3 months after filing contrary to the provision of Order 52 of the English Civil Procedure Rules. In this case, however, the said Order 52 has since been repealed and therefore not applicable.

Application is brought under unknown provisions of law

45. Mr. Kinyanjui further submitted that there is no provision as section 28 (1) (g) of the Employment and Labour Relations Court Act and as such the application before the court is fatally incompetent. I agree with the counsel that section 28 of the ELRC Act is non-existent because it was repealed by Act No. 18 of 2014. I further agree that it was an error for the Petitioner to base his application on a repealed section of the law. However, I wish to observe that the application is not fatally incompetent because it has invoked section 5 (1) of the Judicature Act which is the main provision relating to contempt proceedings. I reiterate that under Article 159 of the Constitution this Court is to exercise its judicial authority without undue regard to technicality. I once again duplicate Order 51 rule 10 of our Civil Procedure Rules which provides the policy in cases the court is faced with an application which has not cited the correct law upon which it is brought or which fails to cite any provision at all:

"10(1) Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused merely by reason of a failure to comply with this rule."

46. I believe that the foregoing provision is the guiding policy for this Court and the courts below. The position may however differ abit in the Supreme Court which is the apex court and where Order 51 Rule 10 is not part of the adjectival law. In the absence of a provision similar to order 51 rule 10 in the rules of procedure for the apex court, strict compliance with the law upon which the specific jurisdiction of the court is invoked would not be an option. Consequently, before the said Court, default to cite the correct provision may not be regarded as a mere technicality and that is reason why in my view only senior legal practitioners have access to the court.

47. The foregoing message was clearly communicated in **Daniel Kimani Njihia v. Francis Mwangi Kimani & Another [2015] eKLR** where the Supreme Court held that:

"Objections to the recourse to improper legal provisions did not come from the other parties. However, the extraordinary

standing of this Court would demand that, in principle, litigants be clear as to the terms of the jurisdiction they are invoking. The litigant should invoke the correct constitutional or statutory provision; and an omission in this regard is not a mere procedural technicality, to be cured under Article 159 of the Constitution." [Emphasis Added]

48. More recently, in **Michael Mungai v Housing Finance Co. (K) Ltd & 5 other [2017] eKLR** the Supreme Court held that:

> **"In the case of Hermanus Phillipus Steyn v. Giovanni Gnnechi-Ruscone, Supreme Court, Application No. 4 of 2012, this Court was categorical that a Court has to be moved under a specific provision of the law. The Court stated that: it is trite law that a Court of law has to be moved under the correct provisions of the law. We reiterate that the only legal regime for the Supreme Court is the Constitution, the Supreme Court Act and the Supreme Court Rules, 2012 (as amended). Hence it is preposterous for the applicant to purport to bring his application under other statutory provisions that are not the Supreme Court Act. It is sadder that he has the audacity to even invoke provisions of repealed pieces of legislations. No court can be moved on the basis of a repealed law. What right if at all does a repealed law give? The answer is clear: none."**

Conclusion

49. I have found that the application dated 11.11.2019 is not fatally incompetent just because it is brought as a notice of motion as opposed to application notice. I have further found that the said two documents are the same in form and substance and there is no prejudice occasioned to the respondents by the use of a notice of motion to initiate contempt proceedings herein. I have also found that there is no requirement to seek leave or serve the Crown office with notice of the application for contempt proceedings related to breach of judgment or order made or an undertaking given. Finally, I have found that the judicial policy under the Constitution and the Rules of Procedure is that procedural technicality should give the way to substantive justice unless the substance of the application is affected by the want of form. Consequently, I dismiss the preliminary objection with costs for lack of merits.

50. The application dated 11.11.2019 will be heard on priority basis on a date to be fixed today. Although the respondents have already responded to the application through their respective counsel, I direct that they be served with the application to appear in court for the hearing.

51. Finally, parties are directed to comply with the consent orders issued on 30.10.2019 which reinstated the petitioner as the Clerk, Nairobi City County Assembly pending the hearing and determination of the petition herein.

Dated and delivered at Nairobi this 20th day of December, 2019.

ONESMUS N. MAKAU

JUDGE