**Nairobi City County v Gachucha (Civil Appeal 601 of 2018)**
**[2024] KEHC 1992 (KLR) (Civ) (29 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 1992 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 601 OF 2018**

**CW MEOLI, J**

**FEBRUARY 29, 2024**

**BETWEEN**

**NAIROBI CITY COUNTY ..... APPELLANT**

**AND**

**JOHN MUKURIA GACHUCHA ..... RESPONDENT**

***(Being an appeal from the ruling of Hon. Nyaloti (CM) delivered on 28th June 2018 in Nairobi Milimani CMCC No. 2818 of 2016)***

## JUDGMENT

1. This appeal emanates from the ruling delivered on 28.06.2018 in Nairobi Milimani CMCC No. 2818 of 2016. The events leading to the impugned ruling were that John Mukuria Gachucha, the Plaintiff in the lower court, (hereafter the Respondent) filed a suit via the plaint dated 10.05.2016 contemporaneously with a motion under certificate of urgency. He named the Nairobi City County as the defendant, (hereafter the Appellant). He sought inter alia the return of the wares and cash enumerated in his plaint or in the alternative, payment in the sum of Kshs.16,000; a permanent injunction restraining the Appellant whether by itself, its agents, employees and or servants from interfering with the business of the Respondent along Kimathi and Safi Lanes for the period of the permits issued for the year 2016; damages for breach of contract; and costs of the suit. The cause of action allegedly arose on 01.05.2016.

2. On 20.05.2016 the Respondent's motion came up for mention, and the court upon hearing oral arguments by counsel for the respective parties, granted an interim order in respect of the Respondent's motion to the effect that "the Defendant whether by itself, it agents and or employees be and is hereby restrained by way of an interim injunction from interfering with the business of the Plaintiff along

Kimathi and Safi Lanes within Nairobi City County in so far as they are within the limits of the business permits issued therein pending the hearing and determination of the application interpartes"

3. The Respondent thereafter moved the trial court vide a motion dated 13.07.2016 expressed to be brought pursuant to Sections 1A, 1B, 3A of the *Civil Procedure Act* seeking inter alia that the officials of the Appellant, including, the Chief Officer, Security, Compliance and Disaster Management, the Director of City Inspectorate, the Assistant Director of City Inspectorate in Charge of Operations, and the County City Superintendent be summoned by the court to explain why they had not ensured compliance with the court order issued on 20.05.2016 and or why they directly or indirectly acted in contempt of the order specifically on 12.07.2016 ; that the court issues an order to compel the Officer Commanding Central Police Station (OCS) to ensure compliance with the court order granted on 20.05.2016; that assorted stock items enumerated, and valued at Kshs. 600,000/- odd, be returned by the Appellant to the Respondent; and a direction to the effect that the orders granted on 20.05.2016 and any other subsequent orders be served upon the Appellant's advocate and the above-named officials of the Appellant to personally ensure compliance and follow up.

4. On 02.08.2016 the lower court directed disposal of the motion by way of written submissions.

5. The lower court delivered its ruling in respect of the motion on 15.02.2017 and apparently finding that the interim order had not been served, proceeded to direct that "the Plaintiff to serve the County Officers named in the application with the court order and the said officers to appear before this court on the 3rd March 2017." When parties subsequently appeared before the trial court on 23.03.2017 to confirm service and compliance with the said order, the court proceeded to issue warrants of arrest against the officers of the Appellant.

6. Subsequently, on 24.03.2017, the Appellant filed a motion expressed to be brought under Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 45 Rule 1 of the Civil Procedure Rules seeking inter alia that the court reviews and sets aside its order of 23.03.2017. The grounds on the face of the motion were amplified in the supporting affidavit sworn by the Evans Omosa Oange, counsel on record for the Appellant. The gist of his affidavit was that the court on 23.02.2017 directed the Respondent to serve eight (8) county officers with summons requiring the said officers to appear before court on 03.03.2017 and that when the matter came up for mention, counsel for the Respondent requested for an extension of the said summons to enable him effect personal service on them of which was extended for a period of fourteen (14) days.

7. He went on to depose that the matter eventually came up on 23.03.2017 to confirm service of the summons, that he did not have the benefit of perusing the respective returns of service and therefore could not ascertain whether personal service had been effected as ordered by the court and that the said returns had not been served on counsel. That it is on the strength of the affidavits of the service filed that the court issued warrants of arrest against the affected officers, that it was evident that the said warrants were issued on misrepresentation of material facts by the Respondent. He thus urged the court to allow the motion as the affected officers would stand condemned unheard.

8. The Respondent opposed the motion through a replying dated 06.04.2017. Thereafter, parties disposed of the Appellant's motion by way of written submissions. The trial court's ruling dismissing the Appellant's motion provoked the instant appeal, which is based on the following grounds:-

> " 1. The honorable magistrate erred in law and fact in dismissing the Appellant's application for review dated 24th March 2017.
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> 2. The honorable court erred in law and fact in finding that the Appellant's officers were properly served with summons requiring the said officers to

appear in court and show cause why they should not be held in contempt of court.

3. The honorable magistrate erred in law and fact by failing to find that the court had ordered personal service of the said summons to appear.

4. The honorable magistrate erred in law and fact in failing to find that there was no personal service of the aforesaid summons to appear on the affected officers.

5. In the circumstances of this case, the honorable magistrate's finding is without support either in law or fact." (sic)

9. The appeal was canvassed by way of written submissions. Counsel for the Appellant condensed the grounds of appeal into two ---- cogent issues for the court's consideration. As concerns whether or not there was proper service of the court order upon the Appellant's officers, counsel anchored his submissions on the decisions in Republic v Kajiado County & 2 Others Ex Parte Kilimanjaro Safari Club Limited [2021] eKLR, Mike Maina Kamau v Hon. Franklin Bett & 6 Others [2012] eKLR, Mutitika v Baharini Farm Limited [1985] KLR 229-234, Hon Basil Criticos v The Hon. Attorney General & 8 Others [2012] eKLR and Halsbury's Law of England, 4th Ed. Vol. 9 at Pg. 37 to submit that contempt of court proceedings cannot succeed unless there was proof of personal service of the court order in issue upon the alleged contemnor.

10. He contended that the affidavit of service relied on as proof of service did not establish personal service upon the officers involved and there was equally no proof of effort made to effect personal service. It was further submitted that in light of the foregoing, the court ought to hold that personal service upon the contemnor is mandatory and supersedes knowledge of the order in question. Concerning whether the Appellant's motion met the threshold of Order 45 Rule 1 of the Civil Procedure Rules, counsel summarily argued that the Appellant had demonstrated sufficient cause to warrant the court's exercise of its discretion in the Appellant's favour. In conclusion, the court was urged to allow the appeal as sought.

11. Despite being accorded ample opportunity, the Respondent failed and or opted not to file submissions in respect of the appeal.

12. The court has perused the record of appeal as well as the original record and considered the submissions canvassed in respect of the appeal. The duty of this court as a first appellate court is to re-evaluate the evidence adduced in the lower court and to draw its own conclusions, but always bearing in mind that it did not have opportunity to see or hear the witnesses testify. See Peters v Sunday Post Ltd [1958] EA 424; Selle and Anor. v Associated Motor Boat Co. Ltd and Others [1968] EA 123; William Diamonds Ltd v Brown [1970] EA 11 and Ephantus Mwangi and Another v Duncan Mwangi Wambugu [1982 – 88] 1 KAR 278.

13. The Court of Appeal stated in Abok James Odera t/a A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR that:

> " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.

14. At the centre of the appeal is the Appellant's motion in the lower court dated 24.03.2017 seeking inter alia the review and setting aside of the warrant of arrest order made on 23.03.2017. The trial court in dismissing the motion in its ruling delivered on 28.06.2018 expressed itself in part as follows:

> " 9. I have considered the application, the supporting affidavit, the replying affidavit and the submissions by both counsel for the Applicant and counsel for the Respondent. I am satisfied that the application lacks merit. The Applicant is already in breach of the court order and no explanation has been given by the Applicants why they cannot obey or comply with the court order of 20th May 2016.
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> 10. The Applicant's application has not met the threshold set out in Order 45 Rule 1.
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> 11. I am satisfied that the Applicants were properly served and are seized with the knowledge of the court orders issued by this court.
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> 12. The application dated the 24th March 2017 is dismissed with costs." (sic)

15. As earlier noted, the Appellant's motion before the trial court was anchored on Order 45 (1) of the CPR which provides that:

> "(1) Any person considering himself aggrieved— (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay."

16. In the court's view, this appeal turns on the question whether the lower court properly exercised its discretion in disallowing the application for review, because the grant or refusal of an application for review of any decree or order involves the exercise of discretion. It is trite that such discretion must be exercised judicially and upon reason, rather than arbitrarily or capriciously. The Court of Appeal in Mashreq Bank P.S.C v Kuguru Food Complex Limited [2018] eKLR stated;

> " This Court ought not to interfere with the exercise of a Judges' discretion unless it is satisfied that the Judge misdirected himself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the Judge was clearly wrong in the exercise of discretion and occasioned injustice. Conversely, a court exercising judicial discretion must be guided by law and facts and not ulterior considerations. This much was stated by the Court of Appeal in the case of Shah v Mbogo (supra):
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> "A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising this discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice". [Emphasis added]

See also United India Insurance Co. Ltd v East African Underwriters (K) Ltd [1985] E.A 898: -

17. Equally, in Jason Ondabu t/a Ondabu & Company Advocates & 2 others v Shop One Hundred Limited [2020] eKLR the Court of Appeal stated that;

> "An application for review, therefore, involves exercise of judicial discretion. The circumstances in which this Court, as an appellate court, can interfere with the exercise of judicial discretion are limited".

18. There is a long line of authorities concerning the principles governing an application for review brought under Order 45 Rule (1) of the Civil Procedure Rules. In the judgment of Okwengu JA in Associated Insurance Brokers v Kenindia Assurance Co. Ltd [2018] eKLR the Court of Appeal stated that:

> "It is clear that Order 45 rule 1(1) of the Civil Procedure Rules provides that a mistake or error apparent on the face of the record is one of the grounds upon which an application for review of a decree or order can be granted. In National Bank of Kenya Ltd v Ndungu Njau [1997] eKLR, this Court had this to say regarding a review arising from a mistake or error apparent on the face of the record:
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> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review." (Emphasis added)
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> In Nyamogo and Nyamogo Advocates v Kogo [2001] 1 E. A. 173 this Court further explained an error apparent on the face of the record as follows:
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> "An error apparent on the face of the record cannot be defined precisely and exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal."

19. Further, in Multichoice (Kenya) Ltd v Wananchi Group (Kenya) Limited & 2 Others [2020] eKLR the Court of Appeal held that:

> "It bears emphasizing that the phrase "mistake or error apparent" by its very connotation conveys the fact that the error envisaged is one which is evident per se from the record and does not require detailed examination, scrutiny and elucidation either of the facts or the

legal position. It is prima-facie visible. It must relate to an error of inadvertence, one which strikes one on merely looking at record. An apparent error on the face of the record has been described in the most simplified manner by the Tanzania Court of Appeal adopting with approval commentaries by Mulla, Indian Civil Procedure Code, 14th Edition pg 2335-36 as follows:

"The courts in India have for many years had to consider what is constituted by "an error apparent on the face of the record" in the context of 0.47, r. 1 of the Code of Civil Procedure and we think their opinions are of immense relevance. We treat for this purpose as synonymous the expressions "manifest" and "apparent". The various opinions are conveniently brought together in MULLA, 14th ed., pp. 2335-36 from which we desire to adopt the following. An error apparent on the face of the record must be such as can be seen by one who runs and reads, that is, an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points on which there may conceivably be two opinions [State of Gujarat v Consumer Education & Research Centre [1981] AIR Guj. 223]... But it is no ground for review that the judgment proceeds on an incorrect exposition of the law [Chhajju Ram v Neki (1922) 3 Lah. 127]..."

See also National Bank of Kenya Ltd v Ndungu Njau [1995-98]2EA 249

20. A review of the trial court record reveals that the Appellant's review motion was primarily premised on the grounds of error apparent on the face of the record. In that respect, it was deposed by the Appellant's counsel at paragraph 3, 7, 8, 9, 12, 13 & 14 of the supporting affidavit that:-

> " 3. That on 23rd February, 2017 this court directed the Respondent to serve 8 County Officers with summons requiring the said officers to appear before the court on 3rd March 2017.
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> 7. That on the said 3rd March, 2017 the matter came up for mention when the advocate for the Respondent requested for extension of the said summons to enable him effect personal service upon the affected officers.
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> 8. That accordingly, the court extended the summons for 14 days and directed the Respondent to serve the affect officers personally with the summons.
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> 9. That on 23rd March 2017 the matter came up for mention when the advocate for the Respondent informed the court that he had effected personal service of summons upon the affected officers and that he had filed a return of service.
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> 10 .....
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> 11 .....
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> 12. That on the strength of the said affidavit of service, the court issued warrants of arrest against the affected officers of the Applicant.
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> 13. That I have since perused the said return of service and established that personal service of the summons was not effected upon the affected officers as per the order of 3rd March 2017.
>
> 14. That it is evident that the said warrants were issued on misrepresentation of facts by the Respondent." (sic).

21. The court ought to determine whether the Appellant demonstrated before the lower court the asserted error or mistake apparent on the face of the record . Concerning the former, the Court of Appeal held in National Bank of Kenya Ltd v Ndungu Njau (1995-98)2EA 249 that:

> "A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.
>
> In the instant case, the matters in dispute had been fully canvassed before the Learned Judge who made a conscious decision on the matters in controversy and exercised his discretion in favour of the Respondent. If he had reached a wrong conclusion of the law, it could be a good ground for appeal but not review. An issue hotly contested cannot be reviewed by the same court which had adjudicated upon it."

22. The undisputed pertinent chronology of events in the lower court has been outlined elsewhere in this judgment. In summary, based on the Respondent's motion dated 10.05.2016 the lower court issued interim orders on 20.05.2016 to the effect that "the Defendant whether by itself, it agents and or employees be and hereby restrained by way of an interim injunction from interfering with the business of the Plaintiff along Kimathi and Safi Lanes within Nairobi City County in so far as they are within the limits of the business permits issued therein pending the hearing and determination of the application interpartes". Alleging the service of the order upon the Appellant, and material non-compliance, the Respondent again moved the court by the motion dated 13.07.2016 essentially seeking enforcement of the interim orders.

23. What the court gathers from the ruling delivered on 15.02.2017 regarding the above motion is that the lower court found no evidence of service of the interim order issued on 20.05.2016, and therefore directed the Respondent to serve the County officers named in the enforcement application with the order and summoned the said officers to appear before the lower court on 03.03.2017 when the matter was scheduled as a mention. The reason and purpose of the summons and mention were not stated, and it is hard to assign the resultant directions to any part or finding in the ruling. Indeed, other than the finding concerning non-service of the interim orders, no other finding in respect of any of the prayers in the motion can be discerned.

24. Be that as it may, when the parties appeared before the trial court on the latter date, counsel for the Respondent requested that the summons be extended for 14 days given inability to effect service of summons. Upon a subsequent appearance on 23.03.2017, the trial court heard rival arguments by respective counsel in respect of service of summons. Apparently satisfied that there was effective service as demonstrated in the affidavit of service by one George Aora, sworn on 22.03.2017, the lower court proceeded to issue warrants of arrest against the Appellant's officers. Consequently, the Appellant moved the court by the motion dated 24.03.2017 and the resultant ruling is the subject of the instant appeal.

25. The Appellant's affidavit in support of the review motion, was premised on the fact that upon perusal of the said return of service in respect of the summons, counsel had established that personal service of the summons was not effected upon the officers as directed by the court on 15.02.2017. Hence the

contention that the warrants were issued on misrepresentation of material facts by the Respondent or "in error" as the case may be.

26. The Appellant contested service of summons in question upon its officers as directed by the court, as asserted by the Respondent. However, the Appellant did not, by disputing service demonstrate the ground of error apparent on the face of the record. The trial court had been satisfied with the return of service in respect of the summons and hence proceeding to issue warrants of arrest against the officers of the Appellant. An erroneous view of a disputed matter, without more, does not amount to an error apparent on the face of the record.

27. Applying the test in National Bank of Kenya Ltd (supra) and established precedent, to the pertinent facts, the review motion was not a proper motion for review but a camouflaged appeal; the trial court had pronounced itself on the question of service of summons. This court is not concerned with whether the latter determination was legally sound but whether the subject matter was a matter suited to a review application on the ground of error apparent on the face of the record. Clearly, the court's finding, whether legally sound or not, did not qualify as an error on the face of the record. It seems that a motion to set aside the warrants issued or an appeal would have been the more appropriate course of action for the Appellant.

28. The court could not properly consider the merits of its impugned service as the Appellant sought by the review motion. The trial court became functus officio upon issuing it order towards warrants of arrest, rightly or wrongly, upon appraising itself as to the question of service, personal or otherwise. The Court of Appeal in Solacher v Romantic Hotels Limited & another (Civil Appeal 167 of 2019) [2022] KECA 771 (KLR) cited with approval the decision of Bennett J in Abasi Belinda v Frederick Kangwamu and Another [1963] EA p.557 to the effect that: -

> " A point which may be a good ground of appeal may not be a good ground for an application for review, and an erroneous view of evidence or of law is not a ground for review, though it may be a good ground for appeal."

29. The appeal is therefore without merit and is liable for dismissal. It is so ordered.

30. However, that is not the end of the matter. Having perused the record of proceedings before the lower court, this court would be remiss not to address glaring procedural and substantive lapses, some of which have already been alluded to, that have come to its attention. These are grave enough, in the court's view, to invalidate the entire process leading to the issuance of the warrants of arrest on 23.03.2017. First, the motion dated 10.05.2016 had by the date of the said warrants not been heard inter partes, as the Respondent had in July 2016 brought his motion seeking to enforce the interim orders. Looking at the affidavits and submissions of the parties with regard to the motion dated 13.07.2016, the contest related to service of the interim orders and the alleged non-compliance therewith.

31. In my reading, the purport of the final paragraph (which contains some incomplete and vague statements) of the court's ruling on the motion, delivered on 15.02.2017, was that there was no proof that the interim order of 20.05.2016 had been served on the County officers named in the contempt application. The court proceeding to order service of the said interim orders upon the said officers to appear in court on 3.03.2017, which was, probably a composite of two limbs of the alternate prayers in the Respondent's motion. The Court did not specifically state the reasons behind these orders or relate them to any of the prayers, and as earlier observed the purpose of the summons and mention date was not stated in the court's order. Having found that there had been no proof of service of the order of 20.05.2016 upon the County Officers named in the contempt application, the court could

not proceed with contempt proceedings and ought to have expressly rejected the related prayers in the motion. The prayers relating to contempt in respect of orders not served on the alleged contemnors could not be saved by the act of ordering subsequent service on them.

32. The court did not address the prayer in the motion, seeking the return of the Respondent's goods, which prayer any event called for a higher threshold being one for a mandatory injunction at interlocutory stage. No such threshold was demonstrated in the material before the court. Similarly, it appears that the court avoided making an explicit determination on the contempt prayers in the motion and proceeded directly to issuing summons against the named officers (an alternative prayer in the motion). Besides, it is evident that by the date of the ruling on the contempt motion, the interim orders earlier granted had been rendered otiose by effluxion of time, because from the Respondent's material in his two motions, the interim orders of 20.05.2016 related to the Respondent's single business licence for the year 2016, which had obviously expired at the end of 2016. For the same reasons, the main motion dated 10.05.2016 may have equally been rendered moot, perhaps explaining the Respondent's non-participation in this appeal.

33. In these circumstances, the court order of 15.02.2017 issuing summons, and directing service of an order whose subject matter had ceased to exist was of no avail; the effectiveness of the subject order had ceased, having been overtaken by events. Even if the orders had continued to subsist, service thereof after the ruling of 15.02.2017 upon the named County Officers, could not be a basis for a finding of contempt under the spent application. A fresh application would have had to be made if there was non-compliance by the County Officers served.

34. In addition, the prayer seeking release of the Respondent's goods had not been granted in the ruling hence there was no justification there for the issuance summons. In the court's view, the requirement in Order 21 Rule 4 of the Civil Procedure Rules regarding the contents of a judgment, namely, statement of the case, issues for determination, decision thereon and reason for such decision, would with necessary modification, apply mutatis mutandis to rulings in respect of applications. The brief ruling of 15.02.2017 clearly fell short of this requirement, rendering the task of deciphering the full purport thereof difficult.

35. Despite the foregoing, the copies on the record, of the order requiring the County officers to attend court and summons subsequently extracted, subsequent proceedings and indeed the paragraph 9 of the court's ruling of 24.03.2017 on the Appellant's review motion, all appear to indicate that the County Officers had by the ruling of 15.02.2017 already been found guilty of contempt in respect of the interim orders of 20.05.2016. In the ruling delivered on the review motion, the court stated inter alia that "The Applicant is already in breach of the Court order and no explanation has been given by the applicants why they cannot obey or comply with the court order of 20th May 2016... the Applicants were properly served....and are seized of the knowledge of the orders of this Court".

36. According to Black's Law Dictionary (Ninth Edition), contempt of court is "conduct that defies the authority or dignity of a court." Actions amounting to contempt of court are quasi-criminal in nature, and in punishing for contempt the court exercises ordinary criminal jurisdiction. In Stewart Robertson v Her Majesty's Advocate, 2007 HCAC 63 it was held that:

> " Contempt of court is constituted by conduct that denotes wilful defiance of or disrespect towards the court or that wilfully challenges or affronts the authority of the court or the supremacy of the law, whether in civil or criminal proceedings."

37. Hence the need for the meticulous application of relevant principles, and particularly observance of the requirement for a high standard of proof by persons alleging such contempt. The Supreme Court of Kenya in Republic v Ahmad Abolfathi Mohammed & Another [2018] e KLR stated that:

> "(24) 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:
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> "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."...
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> (26) 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:
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> "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." ...
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> (28) 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:
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> "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."

38. The Supreme Court proceeded to explain the rationale for the high standard in the following terms:

> "[29] 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 willfully acted in a manner that flouted the Court Order. (emphasis added)
>
> [30] The question that begs an answer, thus, is: did the applicant willfully disobey this Court's Orders?".

39. The summons issued required the named County Officers to show cause in respect of contempt relating to the order of 20.05.2016. In addition, and contrary to the order of the court on 15.02.2017, from the affidavit of the process server George Aora, he served, not the interim order of 20.05.2016 and summons for attendance upon the County Officers but summons to show cause regarding contempt in respect of the order of 20.05.2016. The objection raised by the Appellant's review motion in relation to lack of personal service of summons upon the said officers was therefore off the mark. The problem was not merely about want of personal service. It appears that counsel for the Appellant was not seized of pertinent facts and events recorded in the proceedings.

40. Evidently, the lower court flouted the principles and procedures governing the handling of contempt applications, and applications generally. At the minimum, the lower court ought to have made express findings and determinations, with reasons regarding the prayers in the motion before it. The self-evident procedural and substantive lapses arising from the ruling of 15.02.2017 rendered the subsequent proceedings in the lower court grossly irregular and resulted in a miscarriage of justice, to which this court cannot shut its eyes.

41. Indeed, the latest warrants of arrest issued by the lower court on 31.07.2018 indicated that the County Officers were liable for committal to civil jail for contempt. Because of the irregularities and illegalities, the liberty of the named County Officers stands at risk, whereas no finding of contempt or other adverse finding had been made against them pursuant to the spent motion dated 13.07.2016. In the circumstances, the adverse outcome in the form of warrants of arrest against the County Officers, cannot be allowed to stand.

42. In order to vindicate the rule of law and in the interest of justice, the court invoking its appellate jurisdiction as conferred by Section 78 (2) of the *Civil Procedure Act* and Order 42 Rule 32(2) of the Civil Procedure Rules, will set aside the order in the ruling of 15.02.2017 directing service of the court's order of 20.05.2016, upon the County Officers named in the application dated 13.07.2016, and requiring their court attendance on 3.03.2017. The court substitutes therefor an order dismissing the motion dated 13.07.2016 in its entirety, with costs to the Appellant.

43. For the avoidance of doubt, this means that the warrants of arrest issued consequent to the ruling of 15.02.2017 and extended up until 31.07.2018 are without legal basis and are hereby set aside. In view of the outcome, the parties will bear their own costs in the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Appellant: N/A

For the Respondent: N/A

C/A: Carol