THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT MBARARA

MISCELLANEOUS CAUSE NO. 035 OF 2012

IN THE MATTER OF AN APPLICATION FOR PREROGATIVE ORDERS BY WAY OF JUDICIAL REVIEW IN THE MATTER OF SECTION 36 OF THE JUDICATURE ACT (CAP. 13)

MURIISA NICHOLAS :: APPLICANT

AND

1. ATTORNEY GENERAL
2. KIRUHURA DIST LOCAL GOV'T DISTRICT COUNCIL
3. ELECTORAL COMMISSION
4. GEORGE RUYONDO ::::::::::::::::::::: RESPONDENTS

BEFORE HON. JUSTICE MR. BASHAIJA K. ANDREW

RULING

This application for Judicial Review is brought under the relevant provisions of the enabling law. The Applicant seeks for, *inter alia,* an injunction to restrain the 1st, 2nd, 3rd from allowing 4th Respondents holding or continuing to occupy the Office of LC3 Chairperson of Buremba Sub-County; an order of mandamus to compel the 1st Respondent to implement the High Court and Court of Appeal orders, and to cause 4th Respondent to vacate the public office.

Background.

The 4th Respondent stood for the office of LC3 Chairperson for Buremba Sub-County in the 2011 elections, but his election was nullified by the High Court at Mbarara in

Election Petition No.10 of 2011. The seat was declared vacant and Court directed the 3rd Respondent in writing, in "*Annexture C"* to the affidavit of the Applicant, to conduct fresh elections. A copy of the Court order was also given to the Speaker, Buremba Sub-county.

The 3rd and 4th Respondent lodged an appeal in the Court of Appeal, and the 4th Respondent filed an application for stay of execution in the Court of Appeal, which was dismissed. The 3rd Respondent, did not file for a stay, but did not hold fresh elections as directed by the High Court, and the 4th Respondent continued holding the office of the LC 3 Chairperson and receiving salary and other benefits due of the same office, paid by the 2nd Respondent.

Counsel for the Applicant brought to the attention of the 2nd Respondent the order of dismissal and required them to enforce the High Court order, but neither the 2nd nor the 3rd Respondent complied; for which the Applicant seeks orders as stated above.

Before the application could be heard, Dr. Akampumuza, Counsel for the Applicant, raised a preliminary point which is the subject of this ruling.

Submissions.

Dr. Akampumuza pointed out that there has been a serious issue of contempt of court orders by the Respondents in that:-

(i) The 4th Respondent imputed bad faith on the part of the Judge, Her Lordship Flavia Anglin Senoga, as shown in paragraph 8 of his Affidavit in reply.

(ii) The 4th Respondent and his lawyer purported to make determinations of what the Judge should or should not have done; also in paragraph 8 (supra).

(iii) The 4th Respondent and his Counsel caricatured the Judge, in paragraph 9 (supra), where the 4th Respondent stated that he was informed by his lawyer that enforcement of judgments and court orders is the work of the Registrar, not a Judge, and that the court

order in *"Annexture C" (supra)* which the Judge wrote was out of the ordinary.

Counsel submitted that a court of law cannot act in bad faith, and what the 4th Respondent and his Counsel did was to attack the Judge personally. Further, that the use of the phrase "out of the ordinary" imputes motives on the Judge. That the contempt is further compounded in paragraph 11 (supra) where the 4th Respondent states that he is still on office earning his salary despite the Court of Appeal reinstating the position and refusing to grant him the stay of execution. To back his proposition, Counsel cited the case of ***Housing Finance Bank Ltd. and Speedway Auctioneers Vs. Edward Musisis, C.A Misc. Application No. 158 of 2010***, and that a party cannot be allowed to continue disobeying Court orders.

Counsel strongly argued that rather than purge themselves of the contempt the Respondents instead came to court and attacked a Judge that they do not believe what the Judge stated; which even the Court of Appeal agreed with is correct. Counsel submitted that it is despicable that a party is advised by a lawyer to abuse a Judge on record, which is outright contempt. He also cited the case of ***The Proctor & Gamble Co. Vs. Kyole James Mutisho & 2 Ors, HC Misc. Application No. 135 of 2012,*** to buttress his propositions above.

Dr. Akampumuza went on to submit that ***Article 28(12) of the Constitution*** excludes contempt of court from those offences which must be defined and the penalty prescribed for them to constitute offences. Further, that ***Article 128(3) (supra)*** enjoins all state agencies and organs, whether in court or not, to give effect to court decisions and ensure their effectiveness; and court orders are orders *in rem* and bind the whole world. To back this argument, Counsel cited the case of ***Bashaija Kazoora John Vs Bitekyerezo Medard and Electoral Commission, H.C Election Petition No. HCT – 05 – CV – EP – 004 – 2004***. That, therefore, it is vain for 1st and 2nd Respondents to state that they were not parties to the petition and could not comply with and/or enforce the court orders.

On the procedure for contempt proceedings, Counsel submitted that it may be oral or by formal application, but that the spirit of the law is that it should be brought at earliest so

that the contemnor is stopped from blocking court doing its work and it is able to function normally. Counsel prayed that this court invokes its power to ensure that its orders are complied with.

In response, Mr. Kalemera, Counsel for the 1st and 2nd Respondents argued that the 1st and 2nd Respondents could not be in contempt since they were not party to the matter before the High Court and the Court of Appeal. Further, that under the court orders in *Annexture "C" and "D" (supra)* the 1st and 2nd Respondents were not required to comply.

Regarding ***Article 128(3) (supra)***, Counsel advanced the view that in as much as state organs and agencies are enjoined to give assistance as may be required to ensure the effectiveness of court orders, in this case the Attorney General and Kiruhura District Local Government Administration were not required by the order to ensure that they enforce or implement any of the orders. He prayed for dismissal of the preliminary point raised.

Mr. Sabiti Eric, Counsel for the 3rd Respondent, submitted that although the Electoral Commission (EC) was party to ***Election Petition No. 10 of 2011***, they appealed against the decision of the High Court having been dissatisfied, and as a result of the appeal the EC could not implement the High Court orders.

Counsel submitted that the case being an election related matter; it would not follow the ordinary procedure of other cases on appeal. That under ***Section 95(3) (b)*** of the ***Parliamentary Elections Act (PEA)*** made applicable to Local Council elections through ***Section 172*** of the ***Local Government Act (Cap 243),*** a person is not automatically required vacate office where there is an appeal pending until the appeal process is exhausted.

Counsel also argued that if a by-election is held and the appeal succeeds, it would create chaos. That in the instant case the Court of Appeal did not dispose of the appeal, which is still fully lodged. He also relied on the case of ***Housing Finance Bank Ltd Vs. Musisi & A'nor (supra),*** in that it makes reference to a "set judicial process"; which is still continuing in the present case.

Mr. Sabiti went on that there is only one way in which the High Court is a final court under the ***Electoral Commission Act (Cap.140),*** but that where High Court is a court of first instance, the matter goes all the way to the final court of appeal.

Counsel maintained the stance that the failure to hold a by-election is not contempt because there is an appeal pending and the process is not yet over. He argued that if the prayer is granted, it would have a "botching" effect on the appeal. He prayed that the matter be dismissed with costs.

Mr. Ngaruye – Ruhindi, Counsel for the 4th Respondent submitted that an electoral process is a one-way rack and does not move back and forth. Where the High Court orders a fresh election and there is an appeal, then the EC cannot be ordered to conduct fresh elections before the last Court of Appeal has decided the matter. He argued that if the situation was allowed there would be anarchy.

He further submitted that ***Section 172 Local Government Act (supra)*** gives the EC authority to apply with necessary modifications provisions of the ***Parliamentary Elections Act (supra),*** in particular ***Section 95(3) (b)*** to Local Council elections, where the 4th Respondent would not automatically required to vacate office until the appeal has been disposed of or withdrawn. That in this case the appeals by 3rd and 4th Respondents have not been disposed of. Counsel maintained that the 4th Respondent is not in contempt, as the application does not seek any declaration that the 4th Respondent is in contempt.

On the case of ***The Proctor & Gamble Co. Vs. Kyole James Mutisho & 2 Or's (supra)*** Counsel sought to distinguish it from the present one in that the former had a specific prayer that the applicant was in contempt; while the same is not specifically pleaded in the present application; so that the opposite party knows in advance and brings evidence to show that the declaration ought not be granted.

Counsel further argued that contempt is a question of fact which must be proved to the satisfaction of court, and to be fair to the person he should be given the opportunity to respond. He referred to the case of ***Bashaija John Kazoora Vs Bitekyerezo Medard &***

EC (supra) (page16), to the effect that a person to be affected must be given a hearing first.

Counsel went on to submit that *"Annexture C"* was not copied to the 4th Respondent to require him to comply with the court order, and that neither was he asked by the EC or the Speaker to step down. That the said *"Annexture C"* was kept secret till these proceedings.

Counsel also argued that reference to Court of Appeal ***Misc. Appl. No. 39 of 2011*** is of no consequence as it dismissed an application for stay of execution because it was premature since there was no threat to throw out the 4th Respondent. The application did not decide that the High Court Judge was right to nullify the election; hence the ruling cannot be relied upon.

Concerning the Affidavit of the 4th Respondent; Counsel was of the view that the paragraphs referred to by Dr, Akampumuza are not abusive of the Judge, but noble criticism. Further that the expression "out of the ordinary" is a figure of speech and there is nothing offensive about it. Counsel also prayed for dismissal of the matter with costs.

In rejoinder, Dr. Akampumuza maintained that ***Article.189 (1) (supra)*** places the Attorney General (1st Respondent) in direct responsibility for actions of Local Governments. That the AG was duty bound to implement the decision of the court, which they were well aware of. Regarding the 3rd Respondent, Counsel reiterated that it is in outright contempt because they were party, and in paragraph 6 of the Affidavit of L. Mulekwah, filed on 17/4/2012, the 3rd Respondent claims it was not party to the suit and had nothing to do with the orders, yet the Judge had even written to them directly.

Counsel reiterated that to hold that there has been contempt, there needs not necessarily be a proceeding or a specific prayer for it. Also, that under ***Section 63(6) (c) (ii) PEA,*** court is required to certify forthwith its determination to Clerk of Parliament and the Commission. In the instant case, the Judge was not wrong to write *"Annexture C"*. The Clerk is substituted for Speaker and the Commission is the EC.

Counsel also restated that the decree declared the office of LC3 Chairperson vacant and gave direction to conduct fresh election. The moment the Respondent failed in the attempt to stay execution, the orders of the High Court had to be executed. The Chief Administrative Officer for the 2nd Respondent was informed and cannot claim not to have been aware.

Regarding ***Section 95(3)(b) PEA*** Counsel submitted that to hold that it automatically stays the execution of LC3 officials is to ask this court to overrule the Court of Appeal, which pronounced itself on the provisions when it was hearing the matter. Counsel reiterated his earlier prayers.

Issues.

Quite a number of strong arguments have been advanced, but the main issues, in my view, are only two. They are:-

(i) Whether there has been contempt of court orders by the Respondents; and if so,

(ii) What are the remedies available?

Principles of Law.

There exists an acute dearth as to the statutory and judicial authorities on the phrase "contempt of court" in Uganda. In such circumstances court is enjoined to assign the phrase its meaning in ordinary parlance. ***Black's law Dictionary (7th Ed) at p.313,*** defines contempt as:-

> ***"a disregard of, or disobedience to, the rules or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behaviour or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair respect due to such a body."***

The above definition was applied in the case of ***The Proctor & Gamble Co. Vs. Kyole James Mutisho & 2 O'rs (supra)*** where ***Kiryabwire J,*** cited with approval the case of

Jennison Vs. Baker (1972)1ALL ER 997 (at pages 1001 -1002*) per Salmon LJ,* that there are many forms of contempt but which may be broadly classified as criminal or civil contempt.

Kiryabwire J, in ***The Proctor & Gamble case (supra)*** also cited the case of ***Stanbic Bank (U) Ltd & Jacobsen Power Plant Ltd Vs. Uganda Revenue Authority, H.C Misc. Appl. No. 42 of 2010;*** *per Mulyagonja J,* where it was held that criminal contempt is where ***Section 107*** of the ***Penal Code Act*** is involved, while civil contempt is a common law misdemeanour to be applied by virtue of ***Section 14 (2) (b) and (c)*** of the ***Judicature Act (Cap 13)***.

Noteworthy is the purpose of contempt which exists to ensure that justice shall be done and solely to prohibit acts and words to obstruct the administration of justice. In ***Stanbic Bank (U) Ltd. & Jacobsen Power Point Ltd (supra)*** citing with approval *Salmon LJ,* in ***Jennison Vs. Baker (supra),*** Mulyagonja J, went on to underscore the importance of complying with court orders; and further quoted ***Romer LJ;*** in the case of ***Hadkinson Vs. Hadkinson (1952)ALL ER 567*** that:-

> ***"Disregard of an order of court is a matter of sufficient concern, whatever the order may be..."***

Romer L.J, himself had relied on the case of ***Church Vs Cremer (1 Coop Temp Cott 342)*** where it was held that:-

> ***"A party who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it...It would be most dangerous to hold that suitors or their solicitors, could themselves judge whether the order was null or void – whether regular or irregular. That they should not come to the court and take (it) upon themselves to determine such question. That a course of a party knowing of an order, which was null or irregular and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed..."***

Clearly, for a party to challenge a court order, that party must apply to have it set aside but not to disobey it, even if the party does not agree with it for any reason. Failure to

comply is contempt. In the case of civil contempt, the effect is succinctly expounded upon in ***Halsbury's Laws of England Vol. 9(1) at paragraph 492*** that:-

> ***"…. Civil contempt is punishable by way of committal or by way of sequestration. The effect of the writ of sequestration is to place, for a temporary period, the property of the contemnor into the hands of sequestrators, who manage the property and receive rents and profits. Civil contempt may also be punishable by a fine or an injunction may be granted against the contemnor..."***

It would also appear to me that where an application is brought by way of Judicial Review, as in this case, the remedies for civil contempt are not limited only to what is stated above, but also extend to those which court is empowered to grant in part or absolutely under ***Section.33 of the Judicature Act (supra).*** This court intends to be guided by the above principles in determining this matter.

Resolution of issues.

It is not in contention that there exists a court order, which requires the 4th Respondent to vacate the office of LC3 Chairperson of Buremba Sub-county. It is also not contested that the 4th Respondent did not vacate the office, but lodged an appeal in the Court of Appeal, which dismissed the application for stay of execution.

In the similar terms, the 3rd Respondent (Electoral Commission) was directed, in said the court order, to organise fresh election to fill the post of LC3 Chairperson, which had fallen vacant. The EC also lodged an appeal against the decision of the High Court in the Court of Appeal, but did not apply for stay of execution.

In both instances, the effect is the same in that the dismissal of the 4th Respondent's application by the Court of Appeal restored the *status quo* as to the High Court orders, in as much as the appeal by the EC without obtaining a stay did not; and could not operate as a stay of execution of the same orders. Where an order of court is not stayed, either by a successful application or by operation of a specific law, that order is executable and /or complied with by whomever it is directed to and/ or by whomever it has to be complied with.

I do not agree with the argument that ***Section 95 (3) (b) Parliamentary Elections Act (supra)*** is applicable to Local Council elections by virtue of ***Section 172*** of the ***Local Government Act,*** and that there was no need for the 4th Respondent to vacate office until the appeal had been fully disposed of. ***Section 172 LGA (supra)*** only refers to provisions of ***The Presidential Elections Act,*** and ***The Parliamentary Elections Act*** to be applied with necessary modifications to Local Council elections as may be deemed by the Electoral Commission. (*underlined for emphasis*) On the other hand ***Section 95 (3) (b) PEA (supra)*** refers to a decision by the court. (*underlined for emphasis*).

The two are provided for quite differently, and the reading of the entire of ***Section 95 PEA (supra)*** shows that it specifically refers to MPs in exclusive terms, and would not apply to Local Council elections through the operation of ***Section 172 LGA (supra).*** It only applies to MPs' elections because of the importance attached to the office of the MP. Had the framers intended it to apply to LC offices, they would have expressly stated so.

The EC is only mandated under ***Section 172(supra)*** to apply "with necessary modifications" provisions of the ***Parliamentary Elections Act and Presidential Elections Act*** to local council elections where there is a lacuna in the laws governing the latter elections, but the mandate cannot in any way be stretched or interpreted to include ***Section 95(3) (b) (supra)*** or where a court decision is envisaged as affecting local council elections.

Logically, it follows that where a local council election is nullified, the office bearer automatically vacates his or her seat until, where an appeal is lodged, has been fully disposed of or withdrawn.

In this case, 4th Respondent was required by court order to step aside. He appealed and applied to stay the execution, but the application was dismissed by Court of Appeal. The effect is that despite pendency of the appeal, there was no stay of execution of the High Court orders, which continued to be in force, and the parties had no option but to comply with them. The 4th Respondent did not comply in spite of being aware, which in essence is contempt.

I do not find plausible the view that because "*Annexture C"* was not addressed to him, the 4th Respondent was unaware of it, and hence could not be in contempt. He was, indeed, aware and was a party to the case and the court orders were first and foremost directed to him personally and / or through his Counsel. In that case he did not need any further plodding through *"Annexture C"* for him to comply. The arguments in that regard are devoid of substance.

The 3rd Respondent too, did not comply with the orders as specifically directed. It is not correct to argue that because they filed an appeal in the Court of Appeal, it was not necessary to apply for a stay because of the provision of ***Section 95 (3) PEA*** through the operation of ***Section 172 LGA (supra)***. I have already pronounced on the issue. The position is that if the 3rd Respondent wished to gainsay the order of court, they needed a stay; without which they would be required to comply.

The argument that the 3rd Respondent was not party to the case in High Court ***Election Petition No. 41/2011)*** or ***M.A No. 39 of2011*** in Court of Appeal also lacks merit. "*Annexture C"* (supra) was specific as to what was required of the 3rd Respondent; regardless of their misgivings as to the merits or demerits of the order.

As was held in the case of ***Housing Finance Bank Ltd. & A'nor Vs. Edward Musisi (supra) (on page 11),*** a party who knows of an order regardless of whether in the view of that party the order is null or valid, regular or irregular cannot be permitted to disobey it by reason of what that part regards the order to be. It is not up to that party to choose whether to comply or not to comply with such an order. The order must be complied with in totality, in all circumstances by the party concerned, subject to the party's right to challenge the order in issue, in such a lawful way as the law permits.

I am equally not persuaded by the argument that because the 1st and 2nd Respondents were not parties, they were not required to give effect and/ or implement or comply with the orders in issue. I believe that the 1st and 2nd Respondents were, in no doubt, aware of the existence of the court orders.

My believe is based on the fact that the 1st Respondent is specifically vested with a clear mandate under ***Article 189(supra)*** as being responsible for all actions of Local

Governments in Uganda, while the 2nd Respondent, whose Chief Administrative Officer is a servant of the 1st Respondent, was specifically made aware through a letter *"Annexture D"* by the Applicant's Counsel.

The two being State agencies/organs cannot shy away from the responsibility placed upon them under ***Article 128 (3) (supra)*** by merely deposing that they were not made parties or were unaware of the court order. According to the ***Bashaija John Kazoora case (supra),*** court orders are issued *in rem*, and organs and agencies and / or persons legally and / or constitutionally mandated to implement them are deemed to take cognisance of them.

There was also the argument that the 1st and 2nd Respondents would only give effect and assistance as may be required; and that in this case they were never required to give such assistance. With due respect, that is misconstruing the spirit and letter of ***Article 128 (3) (supra);*** apart from parochial interpretation whose ends would only lead to absurdity.

The expression, "such assistance as may be required", as used does not exclusively denote a specific request made by the courts, but ascribes generally to all what the organs and agencies of the State are legally and/or constitutionally mandated and duty bound to do in the ordinary course of their work; whether a request is made or not.

For instance, the Police are ordinarily required to enforce or help enforce court orders, and the Attorney General cannot be heard to say it was not made aware of any such orders being executed by the Police by reason that the AG was not a party to the proceedings. By law the AG is a party and under the law is required to enforce or help implement the court orders. Similarly, the CAO of the 2nd Respondent as an employee of Central Government falls within the ambit of the 1st Respondent's responsibility. The CAO's action or inaction impacts directly on the 1st Respondent regardless of whether the AG is made party or not.

In this case the 2nd Respondent was infinitely aware of *"Annexture D";* but took no steps to implement the court order. One reads of no other reason for the intransigence but contempt that the 2nd Respondent continued paying the 4th Respondent the salaries

and other monies due of the office of the LC3 Chairperson in spite of being made aware of the orders of court.

I now turn to the particular aspects which were singled out in the 4th Respondent's affidavit in reply as being overtly contemptuous of the person of the Judge. Paragraph 6 states:-

> ***"The 3rd Respondent has not deemed it fit to organise fresh elections and to fill the vacancy because of the pending appeals."***

The above paragraph is against the backdrop of *"Annexture C"*, which was specifically addressed to the 3rd Respondent, whom the 4th Respondent now states did not deem it necessary to comply because of the pending appeals. The 4th Respondent's depositions manifestly exhibit the attitude that a party can only comply with a court order when it deems it necessary to do so and for whatever reason - which is blatant contempt.

Paragraph 7 states:-

> ***"Miscellaneous Application No. 39 of 2011 did not determine the appeal against the decree of the High Court nor did it direct that I vacate office."***

The direct implication of depositions is simply that despite the Court of Appeal decision in the application, the 4th Respondent could not comply with the High Court orders. It is needless to restate the position that once the application was dismissed, the High Court orders were restored, and the party was required to comply.

It is also erroneous for the 4th Respondent to state that, after all, the Court of Appeal did not direct that he vacates office. The Court of Appeal did not direct that he keeps in office either, yet he had filed for a stay of execution in order to keep in office, but it was dismissed. By necessary implication he was required to vacate office. There would be no logic in filing for stay of execution by the 4th Respondent, if it was not to forestall his immediate vacation from office. The dismissal of ***M.A NO.39 of 2011*** by Court of Appeal meant that the status quo obtained, and he was required to vacate office without further prompting.

Mr. Ngaruye-Ruhindi argued that there was no need for the application for stay of execution since; in any case, the 4th Respondent would not be required to vacate office because there was a pending appeal. I respectfully disagree.

Firstly, the pendency of an appeal does not operate as an automatic stay of execution in case of Local Council elections. I have already made clear the position of ***Section 95 (3) (b) PEA*** in relation to ***Section 172 LGA(supra)*** as regards the local council elections, and the 4th Respondent is clearly not covered by that provision.

Secondly, it is a cardinal principle that a party is bound by its pleadings. See ***Jani Properties Ltd. Vs. Dar es Salaam City Council(1966) EA 281; Struggle (U) Ltd Vs. Pan World Insurance Co. Ltd (1990) KALR 46-47.*** The 4th Respondent cannot be heard to say that his application for stay was unnecessary after the dismissal. That would be a typical proverbial case of the "grapes are sour", and he could not have it both ways. He filed for a stay and lost, and as a consequence he is bound by his pleadings and the outcome that he had to vacate office.

Thirdly, in ***M.A No. 39 of 2011*** the Court of Appeal made pronouncements with far-reaching consequences, that the removal of 4th Respondent from Office as LC 3 Chairperson would not cause him irreparable loss; and that the 4th Respondent's appeal has no overwhelming chances of success. The 4th Respondent could not convince the Court of Appeal on the reasons for the stay.

To my mind, the Justices of Appeal simply restated the position that the 4th Respondent must comply with the orders of the High Court because they were satisfied there is no reason to stay them; in as much as they did not see any merit in his case. That is appears to be the *ratio decidendi* in the ruling. Therefore, any other excuse not to comply would fall within the ambit of contempt - not only of the High Court, but also the Court of Appeal orders.

In paragraph 8 it states:-

> ***"I am informed by my Advocate Mr. Ngaruye Ruhindi that Annexture C to the affidavit of the Applicant was written in bad faith in so far as it was written to pre–empt my appeal as it was written before the expiry of the time***

within which I was required to file my notice of appeal and in so far as it was never copied to me, and in so far as it was not proper for the Trial Judge to write such a letter to the Chairperson of the 3rd Respondent and to the Speaker of Buremba Sub – County."

I consider the depositions to be manifestly contemptuous, and border on the abusive of the person of the Judge. To impute bad faith on the Judge, and assert that the orders she issued were motivated by her desire to pre-empt the appeal of a party is a clear case of insolent attack on the person of the Judge.

The expression "bad faith" as defined in ***The Law Dictionary (Featuring Black's Law Dictionary – 2nd Ed)*** means:-

"The opposite of "good faith", generally implying or involving actual or constructive fraud, or design to mislead of deceive another, or neglect or refusal to fulfil some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive."

It is absolutely preposterous that a party takes liberty, on the advice of a lawyer, to abuse a Judge on record, and then claim that it is noble criticism. Criticism - may be; noble – certainly not.

The 4th Respondent and his lawyer also explicitly impute impropriety on the Judge for having issued *"Annexture C" (supra)* claiming - erroneously though - that it is not the work of a Judge, but a Registrar to execute court judgments and decrees.

Of course, it is the duty of court to execute its decrees and orders, and the expression "court" first and foremost means a Judge; for whom the Registrar is an agent and acts for and on behalf of, under ***Order 50 r.1 CPR***. I find the content in paragraph 8 (supra) to be exorbitantly obtrusive in reference to the Judge.

In paragraph 9 he states:-

"I am further advised and informed by my said Advocate that execution of the Decrees and enforcement of Judgments is not the work of the Registrar, not a Judge and the said Annexture C is out of the ordinary"

Here, again the 4th Respondent, on advice of his lawyer, spared no chance to denigrate the Judge, portraying her as meddlesome in the work of the Registrar, and that she acted "out of the ordinary." The expression "out of the ordinary" is not just a figure of speech in the context it was used, as claimed by Counsel for the 4th Respondent. It has the intended effect of casting serious aspersions on the professional honesty and integrity of the Judge.

In what appears to be a conclusion of his oblique tirade of the Judge, the 4th Respondent in paragraph 11 states matter-of–fact, that there was no justification for acting on the orders of the High Court *("Annexture C")* and the Court of Appeal *("Annexture D").*

I do not subscribe to the argument that the depositions are inoffensive or "noble criticism". A party cannot be seen to attack a Judge by imputing ill motives and impropriety in the conduct of court business and one calls it a noble criticism. It is unacceptable impudence to imply dubious questionable motives on a Judge just because she makes a decision which a party may be diametrically opposed to. In the same vein, a party cannot be let off the hook for contempt where it is categorical that that party has not complied with an order by reason of what that party considers the order to be. It is not for the party to choose whether or not to comply with the order. There cannot be a clearer case of contempt laced with outright insolence as in this case.

Let me send a clear and strong message to parties and their lawyers alike: know your bearings with regard to Judges in particular and all judicial officers in general. They are the pillars of justice in observance of the social norms, values and aspirations - the wheels upon which the much cherished civilised and democratic ideals glide, and would be seriously impaired and malfunction leading to total anarchy and eventual collapse, if not carefully nurtured. It behoves everybody to uphold the Judges with the esteem deserving of their noble calling, lest all we value and cherish and stand for as human beings in a civilised society would be lost.

There is need to emphasized that the principle of law is that the whole essence of litigation as a process of judicial administration is lost if orders issued by court through the set judicial process, in the normal functioning of courts, are not complied with in full by those targeted and/or called upon to give due compliance/effect. A State organ, or agency or person legally and duty bound to give due compliance must do so. Court orders cannot be issued in vain.

I find that the Respondents acted, or failed to act, as if the orders of court were of no concern or consequence to them. This trend has been wanton ever since the respective orders were issued up to now. The Respondents acted with contempt of court by paying no regard at all to the court orders to vacate or cause to vacation of the 4th Respondent from the office. The Respondents have themselves to blame for the legal consequences they must suffer for the contempt, until they purge themselves of the same.

Let me comment on the view advanced that contempt of court is a matter of fact to be proved by evidence and that both sides must be heard. This is true only to the extent that both parties must be heard, but contempt is a matter of law both in criminal - under ***Section 107 Penal Code Act*** - and civil under common law, hence applicable by virtue of ***Section 14(2)(b) and (c)*** of the ***Judicature Act (supra)***.

A party is only required to adduce evidence, or point out instances of contempt for it to be duly established. I do not take the view that there must necessarily be a proceeding for contempt to be established, for then matters such as canvassed under the *sub-judice* rule, or where a party is deliberately in contempt of court in its presence would be out of the realm.

In the present case, instances of contempt were pointed out in the respective affidavits of parties, which is evidence under the ***Evidence Act***. Similarly, the parties were given a hearing in the matter; the result of which is this ruling. In my view, the need for adducing evidence and the requirement for hearing of both sides has been duly satisfied.

Before taking leave of this matter, let me also state that the application for Judicial Review was a long route, because all that the Applicant needed was to move court for citation of the Respondents for contempt of the court orders in *Annexture "C" and "D" (supra)*, because the orders were in existence and there was deliberate non-compliance.

Remedies.

Given the nature of the contempt committed, I consider that the appropriate remedy would be to require the contemnors; the 1st, 2nd, 3rd, 4th Respondents to purge themselves by promptly complying with orders in ***"Annexture C"*** and ***"Annexture D" (supra)***. Accordingly, the Respondents are, within 14 days from today, 26/06/2012, ordered to comply with the court orders as follows:-

(a) The 4th Respondent vacates office as Chairman LC3 Buremba Sub-County.

(b) The 1st and 2nd Respondents, and specifically the CAO of the 2nd Respondent, must ensure that the 4th Respondent vacates office as ordered.

(c) The 3rd Respondent complies with the court orders as per *"Annexture C"*.

In event of failure, the Applicant is directed to promptly move court for orders that the contemnors show cause why they should not be committed to civil prison. Costs of this application will be born by the Respondents. I so order.

BASHAIJA K. ANDREW

JUDGE

26/06/2012