REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO 87 OF 2017

KENYA HUMAN RIGHTS COMMISSION.....PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

1. ***Kenya Human Rights Commission***, the Petitioner, is a Non-Governmental Organization. It filed this petition against the ***Attorney General,*** the respondent, and enjoined the ***Law Society of Kenya*** as an Interested Party in this petition which challenges the constitutionality of the ***Contempt of Court*** Act, No 46 of 2016.

2. The petitioner contends that the Act is unconstitutional for being intrusive and retrogressive to the extent that it purports to limit powers of the court to punish for contempt. The petitioner contends that the Act promotes impunity and is discriminative in public governance and therefore violates Article 10 of the constitution on good governance as a national value. According to the petitioner, the Act is an affront to human rights and fundamental freedoms and that the entire scheme of the Act is intended to take away powers of the court thus erode independence of the judiciary.

3. The petitioner states that Articles 2 and 3 of the constitution are clear that the constitution is the supreme law and binds all persons to respect uphold and defend it. It avers that whereas Articles 1 and 160 of the constitution confer judicial authority on the Judiciary, the national assembly reneged on this constitutional edict and enacted a legislation that goes against this principle.

4. It is the petitioner's further case that the impugned Act was enacted without public participation contrary to Articles 10 and 118 of the constitution. According to the petitioner, the long title to the Act is clear that its intention to limit the power of the court to punish for contempt. This, the petitioner pleads, is a Parliamentary scheme to exercise control and influence over the Judiciary thereby interfering with independence of the judiciary. IT also contends that this is a contradiction with section 3 of the same Act which states the objectives of the legislation.

5. The petitioner contends that section 10 of the Act is unconstitutional for depriving a contemnor defences available under the Act; that the section is vague and inconsistent with Article 50 on the right to hearing by implying the strict inability rule and limits the right to fair hearing. The petition further states that section 19 is also unconstitutional for prohibiting recording of court proceedings by parties for their own use.

6. Regarding section 30 of the Act, it is the petitioner's case that it limits the right of access to justice and is an affront to the

independence of the Judiciary by shielding accounting officers of state organs and government departments, ministries or corporations by requiring courts to issue a show cause notice of not less than 30 days before contempt proceedings are commenced against any accounting officers. The petitioner further attacks section 30(4) for intimating that a public officer can be presumed to be guilty without a hearing.

7. The petitioner goes on to contend that section 30(5) of the Act is vague in that it is upon the court to determine liability based on the ingredients of the offence. According to the petitioner, the subsection creates inequality by removing public officers from the operation of section 10 of the Act by providing that no state officer should be convicted for contempt for execution of his duties in good faith.

8. The petition further impugns section 34 as unconstitutional for limiting the right to fair hearing contending that the section limits the period within which contempt proceedings are to be commenced to 6 months. It is the petitioner's case that a decree holder may easily be caught up with this limitation period and that the section is not in tandem with criminal justice which has no limitation.

9. Regarding section 35, the petitioner contends that it is also unconstitutional for elevating Speaker of Parliament above the law. The section provides that a court shall not initiate proceedings for contempt in relation to decisions made as directions given by Speakers in the performance of their official responsibilities. It is contended that the Act is a claw back and contains ouster clauses that are unjustifiable under the constitution as they demolish the safeguards in Articles 49, 50 25 and 24 of the constitution.

10. The petitioner further contends that the fine of Ksh200, 000 is not sufficient as a disapproval of conduct that violates or disobeys court orders. This, the petitioner argues, derives the court the power to fashion an appropriate fine depending on the circumstances of the case. The petitioner therefore seeks the following reliefs:-

a) A declaration that the entire contempt of court Act No 46 of 2016 is invalid for lack of prescribed by the constitution and written law.

e) A declaration that Section 10, 30, 34 and 35 of the impugned Act are inconsistent with the constitution and therefore null void.

f) A declaration that section 19 of the impugned Act is inconsistent with the constitution and it is therefore null void.

g) A declaration that section 30(4) & (5) and section 35 of the impugned Act are vague and uncertain and therefore in violates the right to a fair hearing.

h) The impugned act is unconstitutional to the extent that it limits the powers of the court to exercise its inherent powers and further takes away reliefs and remedies provided by the constitution.

i) Any other, further or better relief that this Honourable court will think fit just to give in the circumstances of this case.

j) Costs of this petition to be granted to the petitioner.

Respondent's Response

11. The respondent filed grounds of opposition dated 22nd May 2018 and filed on 29th May 2018 contending that Parliament is the institution with power to enact laws; that the petitioner has not demonstrated how Parliament violated the constitution during the legislative process; that the petitioner has misapprehended the legislative role of Parliament in the conferment of jurisdiction to courts through an act of Parliament and that the petitioner has misconstrued the law on contempt of court by failing to appreciate that contempt of court is a creature of statute and that courts do not have inherent power or jurisdiction to punish for the same.

12. The respondent further contends that the petitioner has failed to rebut presumption of constitutionality enjoyed by the impugned Act and that the petitioner has failed to prove to the required degree how sections 3, 10, 19, 30, 34 and 35 of the Act or any other section of the Act violate provisions of the constitution.

13. It is the respondent's case that the petition has been instituted on the wrong premise that the impugned Act applies to public

officers only and that to evidence has been adduced to substantiate allegations that continued implementation of the Act promotes corruption, bad governance, impunity and arbitrariness in public governances. It is further contended that it has not been demonstrated that the impugned Act limits the nature of reliefs the court can grant in terms of Article 23 of the constitution and that the petition lacks merit but only seeks to disarm the court's jurisdiction to punish for contempt.

Petitioner's submissions

14. ***Mr. Mwangi***, learned counsel for the petitioner, submits highlighting their written submissions dated 6th February 2018 and filed on the same day, that the impugned Act is unconstitutional both in purpose and effect and relies on the case of ***Law Society of Kenya v KRA (CA No 74 of 2017) consolidated with (CA No 82 of 2012) Centre for Rights Education Awareness & Another v John Harum Mwau & Others*** (pages 8-9 of the decision).

15. Learned counsel argues that Acts of parliament must conform with the constitution and in determining this, the court must look at both purpose and effect and relies on the case of ***R v Big M Drug Mart***. (pages 63 – 64) of submissions and ***Samuel H Momanyi v Attorney General & another*** [2016]eKLR**.** (Paragraph 3 of judgment).

16. According to ***Mr. Mwangi,*** the long title to the impugned statute states clearly that the intention is to define and limit the power of the court to punish for contempt hence the sections of the Act are meant to limit the court's power to punish for contempt an encroachment on the powers of the court. Learned counsel contends that Article 159 as read with Articles 172 and 173 of the constitution are clear that the judiciary is an independent arm of government and it would therefore be wrong for Parliament to legislate in a way that it controls the court on how it punishes for contempt. Counsel submits that a decree holder will not be able to enforce the decree through contempt should the judgment debtor decline to meet the terms of the decree.

17. It is ***Mr. Mwangi's*** view that the court has inherent powers to ensure that integrity of its process is upheld through contempt and relies on the case of ***Richarge N Chapi Leiyangu v IEBC & 2 Others*** [2013]eKLR (Para 24(Authority No 10 in the list). He contends that the Act tends to limit the power of the court to ensure ends of justice. Learned counsel gives the example of section 10 which provides for strict liability in offences and as a result it does not give an opportunity to mitigating factors thus takes away the court's power to hear such mitigation, thus limiting the right to fair hearing.

18. Counsel also attacks section 19 which prohibits electronic recording of proceedings in court by parties which he contends limits the right to fair hearing. He relies on the case of ***Mufart v TV Newzeland Ltd*** [2006] NZLR183 (para 70) submitting that the court should not use unjust means to limit the right to freedoms of expression.

19. Regarding sections 30 and 31 learned counsel submits that they are an affront to the constitution. In learned counsel's view, section 30 shields public officers by prescribing a fine of Ksh200, 000/- contrary to Article 27 of the constitution by encouraging inequality. He relies on the case of Attorney ***General v USofra Co Ltd*** [2005] UL Sci (page 145 of bundle). ***Mr. Mwangi*** argues that the Act creates a favourable environment for contemptuous accounting officers and relies on the case of ***Attorney General v Harris*** [1961] QB 74 (second bundle). He contends that a fine of Kshs200, 000/- is not an effective punishment and limits the court's power to render an effective sentence.

20. Learned counsel further contends that section 34 limits time to a period to 6 months within which to institute contempt proceedings and relies on the case of Kenya ***Bus Service Ltd v Minister of Transport*** [2012] eKLR and ***Mohiom v Minister of Defence*** [1997]2LRC 9 (page 357 of bundle paragraphs D and E) on disparity and handicaps of legal rights including poverty on access to justice.

Respondents' submissions

21. ***Mr. Ogosso***, learned counsel for the respondent also submitted highlighting their grounds of opposition dated 22nd May 2018 and filed on 29th May 2018, that the petitioner has not demonstrated that the process for enacting the impugned Act was not followed; that under Article 109, Parliament enacts legislation in accordance with the constitution and standing orders and that the impugned Act came into force in accordance with Article 116 of the constitution.

22. Learned counsel contends that if the petitioner had a problem with the Act, they should have invoked Article 119 of the constitution and petition to Parliament Accordingly. ***Mr. Ogosso*** submits that contempt of court is a creation of statute and that

jurisdiction is conferred by the constitution, statute or both. According to learned counsel, courts do not have inherent powers to punish for contempt thus this jurisdiction can only be conferred by law. He relies on the case of ***R v Chief Magistrates Court Ex parte Jeff Koinange and Tony Gachok*** [2017]eKLR (para 82). He argues that the power to punish for contempt is conferred by legislation and refers to section 63 of Civil Procedure Act (Cap 21) for that submission.

23. On constitutionality, ***Mr. Ogosso*** submits that there is presumption of constitutionality and therefore every statute enacted by Parliament enjoys this presumption. He relies on the case of ***Mark Ngaiwa v Minister of State to Internal Security and Provincial Administrative & Another [2011] eKLR***. He contends that the petitioner has not rebutted this presumption and relies on the case of ***Muranga Bar Operators Association*** [2011] eKLR.

24. Regarding section 10, learned counsel denies that it limits the court's power to punish for contempt; or that it is vague and ambiguous. On section 19, counsel argues that it does not prohibit recording of proceedings so long as the recording is done with leave of the court. According to counsel, recording of court proceeding by parties to the case, does not in any way enhance the right to fair hearing.

25. ***Mr. Ogosso*** further argues that section 30 does not limit the right of access to justice but rather promotes it. He also argues that the section does not infringe on the independence of the judiciary. He contends that giving notice to show cause is one way of enhancing the right to fair hearing as no one should be condemned unheard and that the section imposes a fine, imprisonment or both.

26. Regarding section 34, learned counsel submits that there is nothing wrong in limiting the period within which contempt proceedings should be commenced. In counsel's view, the section promotes expeditious hearing and disposal of contempt proceedings. As to the constitutionality of section 35, learned counsel submits that the section promotes separation of powers among arms of government. He contends that the petitioner has not shown which constitutional provision has been violated.

27. With regard to public participation, learned counsel submits the court has to look at the entire process and Parliamentary standing orders. He relies on the case of ***Law Society of Kenya v Attorney General*** [2016] eKLR (paragraph 51). ***Mr. Ogosso*** argues that the impugned Act was published on 22nd July 2016 and relies on the case of ***Melakony Semakot firm & Another v President of Republic of South Africa & Others*** [2008] 2ACC 10 (para 50) on public participation. Learned counsel concludes that the whole Act is constitutional and urges the court to dismiss the petition.

Analysis and Determination

28. I have considered this petition, the response thereto; submissions by counsel for the parties and authorities relied on. The issue the court is called upon to decide is whether the Contempt of Court Act is unconstitutional for lack of public participation and or only some of its statutory provisions are inconsistent with the Constitution.

29. The petitioner argues first, that the whole Act is constitutionally invalid for lack of Public participation. According to the petitioner there having not been public participation during the legislative process the Act fails an important national value. Second, it is contended that the Act is inconsistent with the constitution in that from its long title, the purpose and intention of the legislature was to limit the court's power to punish the contempt. The petitioner further argues that even if the court were to find that it cannot declare the whole Act unconstitutional, it should find that the identified sections fail constitutional test of validity. The respondent has denied the petitioner's contention of constitutional invalidity and argues that the law making process was followed and that the Act is consistent with constitutional.

Whether there was Public Participation

30. The petitioner has contended that there was no public participation in the legislative process leading to the enactment of the impugned Act. The respondent has however denied this contention arguing that the law making process was followed. He has contended that Parliament enacts legislation in accordance with the constitution and standing Orders and that the impugned Act came into force in accordance with Article 116 of the constitution and that the Act was published on 22nd July 2016 as required.

31. Public participation is one of the national values and principles in our constitution which must be observed by all persons; state organs and public officers in the exercise of their responsibilities. Article 10(1) of the constitution states that the national values and

principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution; (*b*) ***enacts,*** applies or interprets any law; or makes or implements public policy decisions. .And according to Article 10(2), the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and "***participation of the people".***

32. The enactment of the impugned Act was a legislative process and for that reason the national Assembly was bound by the national value and principle of public participation as well as the principles of governance including transparency and accountability. Furthermore, Article 118 of the constitution is clear that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should facilitate public participation and peoples' involvement in its legislative and other business including those of its committees

33. The petitioner has pleaded as well as submitted that the legislative process that midwifed the impugned statute did not take into account Public Participation and, therefore, the process violated one of the key national values and principle of governance. The respondent has not alluded to the issue of public participation at all in its formal response to the petition. ***Mr. Ogosso*** has only submitted orally that the process was followed and that the court has to look at the entire legislative process and Parliamentary standing Orders. No written response was filed at least to address this critical issue. Article 259(1) of the constitution behooves the court when interpreting the constitution to do so in a manner that promotes its values and purposes. One of the values and principles of our constitution is public participation.

34. Article 2 of the constitution decrees that the constitution is the Supreme Law and binds all persons, state organs and public officers. Article 3 of the constitution obligates every person to respect, uphold and defend the Constitution. Every person here includes the National Assembly as a state organ.

35. Once a petitioner attacks the legislative process on grounds that the law making process did not meet the constitutional standard of public participation, the respondent is under a legal obligation to demonstrate that the legislative process did meet the constitutional standards of public participation. And because it is the constitutional duty of Parliament to ensure that there is public participation, the Attorney General as the respondent, has the legal burden to disprove this contention. This is so because it is a constitutional requirement that the National Assembly conducts its affairs in compliance with the constitution.

36. The constitutional text in Article 118(1) under the sub title ***"public Participation"*** states in plain language that Parliament should conduct its business in an open manner, and its sittings and those of its committees should be open to the public and it should "f***acilitate public participation and involvement in the legislative and other business of parliament and its committees."***

37. Public participation as a national value was central in the legislative process. The respondent apart from merely stating and orally so, that there was public participation and that the court has to look at the entire legislative process, and that the Act was published on 22nd July 2016, has not done anything or adduced any other material evidence to demonstrate that indeed Article 118(1) (b) of the constitution was complied with during the enactment of the impugned Act. Publication of the Act alone could not and did not amount to Public Participation in terms of Article 118(1) (b).

38. In the South African case of ***Matatiele Municipality & Others vs The President of South Africa & Others*** *(2) (CCT 73/05 A [2006] ZACC 12; 2007 (1) BCLR 47 (CC)* , the Constitutional court stated that;

"The representative and participative elements of our democracy should not be seen as being in tension with each other...What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process"

39. *In* ***Minister for Health vs New Chicks South Africa Pty Ltd*** *CCT 59/04,* the same court observed that *the forms of facilitating an appropriate degree of participation in the law making process are indeed capable of infinite variation and that what matters is that at the end of the day a reasonable opportunity is offered to the members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case.*

40. In ***Robert N. Gakuru & others v Kiambu County Government & 3 others*** [2014] eKLR the Court observed;

"[P]ublic participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfillment of the Constitutional dictates. It is my view that it behooves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively. It is not just enough, in my view, to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as many fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action. Article 196(1) (b) just like the South African position requires just that."

41. On appeal against the above decision, the court of Appeal affirmed the decision in ***Kiambu County Governent & 3 others v Robert N. Gakuru & Others*** [2017] eKLR stating;

[20]"…The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. The Constitution in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,.."

42. The court went on to state that public participation must include and be seen to include the dissemination of information, invitation to participate in the process and consultation on the legislation. That is, people must be accorded an opportunity to participate in the legislative process and ***this is a question of fact to be proved by the party that was required to comply with this constitutional requirement that indeed there was compliance.***

43. In the words of ***Ngcobo, J.*** in ***Doctors for Life International v. Speaker of the National Assembly & Others*** (CCT 12/05) [2006] ZACC 11, 2006(12) BCLR 1399(CC), 2006 (6) SA 416 (CC)) *merely allowing public participation in the law-making process is not enough. More is required and measures need to be taken to facilitate public participation in the law-making process.*

44. And in the case of ***Land Access Movement of South Africa Association for Rural Development and others v Chairperson of the National Council of Provinces and others*** [20016] ZAACC22 the court observed with regard to the standard of public participation;

"***The standard to be applied in determining whether Parliament has met its obligation of facilitating public participation is one of reasonableness. The reasonableness of Parliament's conduct depends on the peculiar circumstances and facts at issue. When determining the question whether Parliament's conduct was reasonable, some deference should be paid to what Parliament considered appropriate in the circumstances, as the power to determine how participation in the legislative process will be facilitated rests upon Parliament. The Court must have regard to issues like time constraints and potential expense. It must also be alive to the importance of the legislation in question, and its impact on the public."***

45. Applying the above legal principles to this petition, there is no doubt that the legislation was important to the public and that public participation was an important segment of the legislative process. That notwithstanding, there was no attempt on the part of the respondent to show that there was any semblance of public participation in the legislative process leading to the enactment of the impugned Contempt of Court Act. That being the state of affairs, the court has no option but to agree with the petitioner that there was violation of an important constitutional step in the form of public participation and the Act fails this constitutional compliance step.

Whether provisions of the Act are inconsistent with the constitution

46. The petitioner has also impugned a number of provisions of the Act on grounds that they are inconsistent with the constitution. The concerned provisions are sections 10, 19, 30, 34 and 35. Before embarking on the discourse to ascertain the constitutionality of the impugned provisions, it is important to briefly remind ourselves the principles that underlie determination of constitutional validity of a statute or its provisions.

47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as peoples' representative understands the problems people they represent face and, therefore enact legislations intended to solve those problems. In ***Ndynabo v Attorney General of Tanzania*** [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the country.

48. Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the constitution. In ***Olum and another v Attorney General*** [2002] EA, it stated that;

"***To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the Constitution, the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the Constitution, the impugned statute or section thereof shall be declared unconstitutional."***

49. In ***The Queen v Big M. Drug mart Ltd,*** 1986 LRC (Const.) 332, the Supreme Court of Canada stated that;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."

50. And in the case of ***Centre for Rights Education and A wareness & another v John Harun Mwau & 6 others***[2012] eKLR the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act and this can be discerned from the intention expressed in the Act itself.

51. The long title to the Contempt of Court Act states that it is to define and "***limit the powers of courts in punishing for contempt of court"*** and for connected purposes. The objective of enacting the Act in the Memorandum of objects and reasons in the Bill that was introduced in the National Assembly also states that "***the principle object of the Bill was to define contempt of court and to limit the power of court to punish for contempt of court."*** It is therefore clear that one of the primary legislative objectives of enacting this legislation was to limit the power of the court to punish for contempt.

52. The long title to the Act seems to contradict section 3 of which underlines the objectives of the Act to uphold the dignity and authority of the court; ensure compliance with directions of the court, observance and respect of the process of law; preserve an effective and impartial system of justice and maintain public confidence in the administration of justice as administered by court.

53. To achieve the objectives in section 3, section 4 of the Act identifies the forms of contempt for which the court may punish as "***Civil contempt"***-that is; the willful disobedience of any judgment, decree, directive order or other process of court or willful breach of an undertaking given to a court; and "***criminal contempt"***- which includes the publication in any form whether by spoke or written words, visible signs or representation or doing an act which tends to scandalize or lower judicial authority of the court or something that prejudices or interferes with the course of justice. On this alone, it is clear that if the principle aim of the Act is to limit the power of the court to punish for contempt this aim creates an internal conflict within the statute itself.

54. But why would the legislature want to limit the court's power to punish for contempt and what would be the effect if this were to be allowed" These questions can be well answered by examining why courts punish for contempt in the first place.

Contempt and why punish

55. According to section 4 of the impugned Act, contempt is the wilful disobedience or disregard of a court orders, judgments decrees or directions. It is therefore the offence of being disobedient or discourteous towards courts and their officers in the form of behavior that opposes or defies the authority, justice and dignity of the court. Contempt manifests itself in the willful and intentional disregard of or disrespect for the authority of the courts, a behavior that is regarded illegal because it does not obey or respect the authority of the courts and their processes and tends to lower the dignity of the courts.

56. The constitution (Article 4(2) declares Kenya a democratic state founded on national values and principles of governance which include the rule of law and democracy. Disobedience and disregard of the authority of the courts violates national values and the constitution. In that regard, courts punish for contempt in order to maintain their dignity, authority, the rule of law, democracy and administration of justice as foundational values in our constitution.

57. Article 159 of the constitution recognizes the judicial authority of courts and tribunals established under the constitution. Courts and tribunals exercise this authority on behalf of the people. The decisions courts make are for and on behalf of the people and for that reason, they must not only be respected and obeyed but must also be complied with in order to enhance public confidence in the judiciary which is vital for the preservation of our constitutional democracy. The judiciary acts only in accordance with the constitution and the law (Article 160) and exercises its judicial authority through its judgments decrees orders and or directions to check government power, keep it within its constitutional stretch hold the legislature and executive to account thereby secure the rule of law, administration of justice and protection of human rights. For that reason, the authority of the courts and dignity of their processes are maintained when their court orders are obeyed and respected thus courts become effective in the discharge of their constitutional mandate.

58. In ***Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & another*** CCT 19/11(75/2015). ***Nkabinde,* j** observed that:-

"The rule of law, a foundational value of the constitution, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of courts to carry out their functions depends upon it. As the constitution commands, orders and decisions issued by a court bind all persons to whom and organs of state to which they apply, and no person or organ of state may interfere in any matter, with the functioning of the courts. It follows from this that disobedience towards courts orders or decisions risks rendering our courts impotent and judicial authority a mere mockery. The effectiveness of court orders or decisions is substantially determined by the assurance that they will be enforced."

59. In the case of ***Canadian Metal Co. Ltd v Canadian Broadcasting Corp(N0.2)*** [1975] 48 D.LR(30), the court stated that;

"To allow court orders to be disobeyed would be to tread the road toward anarchy. If orders of the court can be treated with disrespect, the whole administration of justice is brought into scorn… if the remedies that the courts grant to correct… wrongs can be ignored, then there will be nothing left for each person but to take the law into his own hands. Loss of respect for the courts will quickly result into the destruction of our society."

60. Courts therefore punish for contempt to insulate its processes for purposes of compliance so that the rule of law and administration of justice are not undermined. Without this power or where it is limited or diminished, the court is left helpless and its decisions would mean nothing. This ultimately erodes public confidence in the courts; endangers the rule of law, administration of justice and more importantly, development of society. That is why the court stated in ***Carey v Laiken*** [2015] SCC17 that; ***"Contempt of court rests on the power of the court to uphold its dignity and process. The rule of law is directly dependent on the ability of the courts to enforce their process and maintain their dignity and respect"***

61. It is therefore a fundamental rule of law that court orders be obeyed and where an individual is enjoined by an order of the court to do or to refrain from doing a particular act; he has a duty to carry out that order. The court has a duty to commit that individual for contempt of its orders where he deliberately fails to carry out such orders. **(*Louis Ezekiel Hart v Chief George 1 Ezekiel Hart* (-SC 52/2983** 2nd February 1990). And in ***Hon. Martin Nyaga Wambora and Another v Justus Kariuki Mate & Another*** [2014] eKLR, the Court stated the duty to obey the law by all individuals and institutions is cardinal in the maintenance of rule law and administration of justice.

62. It is therefore clear that the importance of the judiciary in the maintenance of constitutional democracy cannot be overemphasized. In order to achieve this constitutional mandate, the judiciary requires the power to enforce its decisions and punish those who disobey, disrespect or violate its processes otherwise courts will have no other means of ensuring that the public benefit from the judgments they hand down and the orders and or directions made on their behalf. When stripped of this power courts will be unable to guarantee compliance with their processes and will certainly become ineffective in the discharge of their duties and performance of their functions with the ultimate result that the public, as trustees of the rule of law, will be the major victim.

Can Parliament limit the courts' power to punish for contempt"

63. From the above discourse, the purpose of enacting the Contempt of Court Act should be to enhance the power and effectiveness of courts to punish for willful disobedience of their processes. This is because "***punishing through contempt of court is the means by which courts sanction non-compliance with its orders, judgments and decrees, and a court of justice without power to vindicate its own dignity, to enforce obedience to its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which could not be permitted to exist in any civilized community. Without such protection, courts of justice would soon lose their hold upon the public respect, and the maintenance of law and order would be rendered impossible"***. (James Francis Oswald, *Oswald's Contempt of Court: Committal, Attachment, and Arrest upon Civil Process* (Butterworth & Company, 1910, p. 9.)

64. ***Mr. Mwangi,*** learned counsel for the petitioner, contended that the impugned Act is intrusive to the inherent power of the courts to punish for contempt. ***Mr.Ogosso*** on his part argued in favour of the Act contending that the power to punish for contempt is not inherent but is given by statute. I do not agree and learned counsel could not be more wrong on this. The courts' power to punish for contempt is inherent. It is the residual authority courts are endowed with, that is not granted by statute and which courts use to ensure the ends of justice are met in the protection of society. The statute should only provide how the power is to be applied. It should make courts more effective but not limit their power. The fact that the courts have inherent power was appreciated by ***Musinga JA,*** when he observed in the case of ***Equity Bank Limited v West Lnk MboLimited*** [2013] eKLR, that inherent power is the authority possessed by a Court implicitly without it being derived from the Constitution or statute which power enables the judiciary to deliver on their constitutional mandate. The court does not, therefore, get the power to punish for contempt from a statute. The Act should only facilitate court' exercise the power.

65. The fact that the power to punish for contempt is inherent and not granted by statute, follows the recognition by the constitution in Article 159 that judicial authority is derived from the people and vests in, and is exercised by the courts and tribunals established by or under the Constitution. Judicial authority having been derived from the people, the judiciary serves the public and courts make pronouncements for and on behalf of the people. In doing so, courts act only in accordance with the constitution and the law as demanded by Article 160(1) of the constitution. In that respect, therefore, the powers of the courts must be viewed from the supremacy clause in Article 2(1) of the constitution so that any attempt to limit the power to punish for contempt violates a foundational constitutional value on judicial authority. Any legislation on contempt must be in addition to but not in derogation of the constitution for such limitation or derogation will surely be unconstitutional.

66. **This view finds support in the Supreme Court of India's holding in *Bar Association vs. Union of India & Another.*[1998] 4 SCC 409** where the court dealt with constitutional powers vested in it under Article 129 read with Article 142(2) of the Constitution of India and those of the High Court under Article 215 of the Constitution to punish for contempt and remarked that no act of Parliament can take away the inherent jurisdiction of the Court of record to punish for contempt. The court went on to state that;

"Parliament's power of legislation on the subject cannot, therefore, be so exercised as to stultify the status and dignity of the Supreme Court and/or the High Courts, though such a legislation may serve as a guide for the determination of the nature of punishment which this court may impose in the case of established contempt."

67. **The same court once again observed in *Sudhakar Prasad v. Government of Andhara Pradesh & others.*[2001] SCC 516,** that the powers of contempt are inherent in nature and the provisions of the Constitution only recognize the said pre-existing situation and that the provisions of the Contempt of Courts Act, 1971, are in addition to and not in derogation of Articles 129 and 215 of the Constitution and that the provisions of Contempt of Courts Act cannot be used for limiting or regulating the exercise of jurisdiction contemplated by the two Articles.

68. Flowing from the above decisions and considering the Articles in our constitution, it is plain that the principle aim of the impugned contempt of Court Act to limit the power of courts to punish for contempt violates the letter and spirit of the constitution. The Act can only aid but not stifle that power. Where the purpose of legislation is in conflict with the constitution that inconsistency renders the legislation or its provisions constitutionally invalid. (***Olum and Another v Attorney General - supra).*** I therefore find and hold that as the primary purpose of the contempt of court Act was to limit the courts' power to punish for contempt, it is inconsistent with the supremacy clause in Articles 2(1), 4(2),159and 160 of the constitution and encroaches on the independence of the judiciary.

Whether sections 10, 19, 30, 34 and 35 are constitutionally invalid

69. The petitioner has impugned section 10 of the Act contending that it applies strict liability to the offence of contempt thus denies

an alleged contemnor an opportunity to mitigate which takes away the court's powers to hear the mitigations thus interferes with the right to fair hearing. Section 10 states that(1) under "the strict liability rule" conduct may be treated as contempt of court as tending to interfere with the course of justice in particular legal proceedings regardless of intent to do so. And that (2) the strict liability rule applies only in relation to publication, and for that purpose, "publication" would include any speech, writing, broadcast or other communication in whatever form, which is addressed to the public at large or any section of the public. Section 10 (3) states that a person shall be strictly liable for contempt of court in any case where the person does any act which interferes or tends to interfere with the course of justice in relation to any judicial proceedings. And (4) for purposes of subsection (3), it shall be immaterial whether the interference was not intentional.

70. The impugned section creates strict liability contempt so that conduct will be treated as a contempt of court for tending to interfere with the course of justice in particular legal proceedings regardless of intention to do so. Section 10(1) defines the scope of this form of contempt, while section 10(2) makes it clear that the strict liability rule applies only to publications, that is; any speech, writing, broadcast or any other form of communication that is addressed to the public, or any section thereof. The rule applies only to publications which create or have the potential of creating a substantial risk to the extent that the course of justice in the proceedings in question will be seriously impeded or prejudiced. It is also clear from section 10 (3) that the strict liability rule will only apply to publications in relation to proceedings that are active.

71. The petitioner's contention is that application of strict liability interferes with the right to fair hearing and denies the contemnor an opportunity to mitigate. Whereas every person has a right to be heard, the impugned section prohibits doing something that has the potential of interfering with the course of justice. The aim of the section is to protect the course of justice in the judicial proceedings. The application of strict liability will however depend on the nature of the publication and the extent to which it would interferes with the course of justice. It does not, in my view, interfere with the right to freedom of expression. Rather it is intended to protect the integrity of judicial proceedings and the right of those before the courts and the publication must relate to pending, imminent or reasonably likely to occur.

72. Although section 10 would appear like creating a limitation to the freedom of speech and the press by restricting what can or cannot be said about proceedings before court regarding say, a person who is accused of a crime, it is important to bear in mind that these rights are not absolute. Freedom of expression does not, for example, extend to derogatory remarks made about others. The limitation is intended to protect rights of others so that whilst one is free to exercise his own rights in Article 33(1) which guarantees the right to freedom of expression, he should appreciate the limitations in Article 33(2) which protect the right of others not to be vilified.

73. The restriction shows that although freedom of expression is a fundamental right, protection of freedom of others and the administration of justice are more important than the unrestricted enjoyment of one's own freedoms. In this regard, it is the right to a fair trial contained in Article 50(2) of the constitution that is being protected. This limitation, in my view, is justifiable on grounds that although judges as rational men and women may not be swayed by what they hear or read regarding a party to a case before them, the general public may not and, therefore, the right to fair trial in our judicial system would suffer prejudice due to negative comments that a publication may contain. In that regard, it is becomes necessary to restrict what can be published about those in the process of a trial as the right to fair and unbiased public hearing outweighs the enjoyment of one's own rights. The limitation is justifiable in an open and democratic society.

74. The petitioner again impugns section 19 of the Act which prohibits electronic recording of court proceedings by parties to the suit or case. According to the petitioner the section limits the parties' right to fair hearing and to that extent, the section is inconsistent with Article 50(1) of the constitution. Section 19 makes it a contempt of court to use any recording device or instrument for record proceedings such as a tape recorder, or instrument to record sound except with leave of the court. The section further prohibits publication of a recording of legal proceedings made by means of any such instrument or any recording derived directly from or otherwise indirectly from such recording by playing it in the hearing of the public or any section of the public, or the disposing of it with a view to publishing it or use such recording in contravention of any conditions granted. Section 19(2) states that leave may be granted or refused by the court, while section 19(3) is to the effect that without prejudiced to the court's power to deal with contempt, the court may order destruction of the instrument used and the court may order confiscate dual instrument and it can be sold after the court determines any application by the owner.

75. For my part, I do not see any inconsistency between this section and the Constitution. Article 159 of the constitution reposes judicial authority to the courts. While exercising this authority, courts have to maintain integrity of their processes and anyone wishing to record its proceedings may seek leave of court to do so, and the court may grant such leave with or without conditions. Recording of court proceedings by parties to the case does not in any way advance the right to fair hearing. The right to fair hearing

in terms of Article 50(1) of the Constitution is to be understood in context; that disputes are to be heard by impartial courts, tribunals or bodies, in open courts and without delay. When a case is being heard in the presence of parties, whether represented or not, it does not make sense for them to record proceedings they are taking part in. The same applies to members of the public. For what purpose would a party to a case want to record proceedings" Failure to record proceedings does not in any way infringe on the parties' rights.

76. The limitation in section 19 is, in my view, reasonable for it is intended to protect the integrity of the court process so that anyone wishing to record its proceedings, except for the media who, in any case comply with media guidelines, must seek the court's leave and if there are good reasons for doing so, the court would have no difficulty granting such leave.

77. ***Mr. Mwangi***, learned counsel for the petitioner, relies on the case of ***Mufart v TelevisionNewzealand Ltd*** (supra) to argue that the court should not use unjustified means to limit the right to freedom of expression. In the above case, the court stated that there would be no justification for courts to exercise something akin to a censorship role, or to encourage the use of the courts as in effect, a public information filter; and that courts must be careful not to sanction unjustified limitations on the right of freedom of expression. I do not find this decision helpful in justifying recording of court proceedings by parties to the case.

78. Limiting parties' right to record court proceedings does not violate their right to freedom of expression. The decision relied on was in relation to a TV broadcast which was intended to inform the public and the recording was not by parties to the case who have no obligation to inform any public forum and therefore have no duty to record court proceedings for such a purpose. I therefore see no constitutional invalidity in this section.

79. The petitioner further complains about Sections 30 and 34 as being an affront to the constitution. The petitioner complains that Section 30 shields public officers and prescribes low fines. It is also contended that the section violates Article 27 of the constitution for being discriminatory and encourages inequality. Section 30 deals with contempt by Public Officers, section 30(1) provides that if a state organ, government, department, Ministry or corporation is guilty of contempt, the court should serve a 30 days' notice on the accounting officer requiring the accounting officer to show cause why contempt proceedings should not be commenced against him/her.

80. Subsection (2) states that contempt proceedings should not be instituted against the accounting officer without the court issuing a thirty days' notice to the officer and the notice so issued should be served on the accounting officer as well as the Attorney General. Subsection (4) states that if the officer fails to respond to the notice to show cause, the court will proceed to commence contempt proceedings and where the officer is found to be guilty of contempt he/she may with leave of the court be liable to a fine not exceeding two hundred thousand shillings. However subsection (6) states that no state officer ***shall be convicted of contempt of court for execution of his duties in good faith***.

81. The petitioner contends that the section is, first; discriminatory and second, defensive of state officers and government officials. In their view, the section tends to shield public officers from contempt and, therefore, accords them differential treatment which is discriminatory.

82. The jurisdiction of the court to punish for contempt is meant to ensure that court's decisions and directions are obeyed and enforced. The constitution in Article 27 gives all persons the right to equal protection and benefit of the law. However the impugned section 30, first states that no contempt proceedings can be instituted against a public officer unless a thirty days' notice is issued and served both on the accounting officer and the Attorney General. And second, that where the accounting officer is found to be guilty of contempt he is to be fined two hundred thousand shillings.

83. Courts punish for contempt in order to preserve dignity and integrity of the court process, judicial system and for the benefit of the people by ensuring that its orders and processes are complied with. That notwithstanding, the impugned section requires the court to issue a 30 days' notice before contempt proceedings are instituted. It must be appreciated that in some instances public officers would be required to comply with court orders or directions and perform some duties immediately to ensure the ends of justice. There would therefore be no rationale why a public officer who is in contempt of court for failure to comply with court orders or directions immediately thus interfering with the course of justice, should be given 30 days before contempt proceedings are initiated against him, taking into account the special nature of contempt proceedings yet others in similar misdeeds are not given such an opportunity.

84. This discriminatory and is aimed at hampering the court's ability to enforce its processes for the benefit of those in whose

favour it has found. It is against the principle that ***"all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts and the laws of the land should apply equally to all, save to the extent that objective differences justify differentiation"*** (***Tom Bingam; The Rule of Law,*** London Penguin Press, 2010). I find no legitimate, reasonable or justifiable government purpose to be served by this differential treatment accorded to public officers as opposed to private citizens under the impugned provision.

85. The section has another problem. It prescribes only a fine of two hundred thousand shillings where an accounting officer has been found guilty of contempt compared to the sanctions in section 28(1) which prescribes a fine of two hundred thousand shillings, or six months imprisonment or both. Section 30 is clearly protectionist in favour of government officials yet both will have committed similar offence(s) of contempt. There can be no justification in a constitutional democracy to give public officers differential treatment to that accorded to other persons though both are in contempt. This is an unjustifiable discrimination that is outlawed by the constitution. It violates the principle that the laws of the land apply equally to all, save to the extent that objective differences justify differentiation

86. Depriving courts the opportunity to exercise similar powers while imposing a fine or sentence of civil jail and allowing only a fine, the section was indeed intended to cripple the courts' effectiveness in enforcing its decisions thus rendering it a paper tiger with a mighty roar but with no teeth to bite.

87. In the case of ***Attorney General v Harris*** (1961) 1 QB 74 ***Sellers LJ*** decried differential treatment in form of fines and observed that; ***"it cannot, in my opinion, be anything other than public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it."***

88. The above observation would also fit our situation given that section 30 (6) even suggests that an accounting officer should not be penalised for contempt provided he was acting in good faith. A person is in contempt of court if he/ she wilfully, intentionally and knowingly disobeys a court order. One cannot act in good faith by wilfully disobeying or disrespecting court orders. Defences for contempt cannot include the fact that one was acting in good faith. A statutory provision suggesting such a defence flies in the face of the courts' power to punish for deliberate disregard of their orders and mutes the courts' roar against such conduct. Section 30 clearly fails the constitutional master of validity for being inhibitive to the true meaning of courts as the interpreters of the constitution, arbiters in disputes between parties and the temple of justice.

89. The petition also attacked the constitutional validity of section 34 of the Act on the grounds that it limits the period within which one can institute contempt proceedings. According to the petitioner, this limitation does not advance the cause of justice. ***Mr. Ogosso*** on the other hand contends that the limitation period is meant to encourage parties to embrace quick resolution of cases.

90. Limitation period within which to file cases including contempt proceedings rests on the foundation of public interest so that there are no dormant claims which would most likely have injustice on the part of a respondent who may lose crucial evidence to disprove such a claim due to lapse of time. People are therefore expected to pursue their claims with reasonable diligence and within the stipulated period.

91. The period of six months within which to commence contempt proceedings does not, in my view, hinder the course of justice. This is because an aggrieved party has six months from the time the act constituting contempt is committed to commence contempt proceedings. Limitation period has a purpose. It is intended to ensure that litigation is brought to a quick and speedy conclusion. Where one has violated a court order, the aggrieved party does not have to wait for six months to commence contempt proceedings. If one were to wait for that long, he/she would be deemed to have condoned the contemptuous act. I therefore see no unconstitutional purpose or effect in this section that should invalidate the provision.

92. Finally the petitioner contends that section 35 is also constitutionally invalid. The section provides that a Court shall not initiate contempt proceedings in relation to a decision made or directions given by a Speaker of a House of Parliament in the performance of his or her official responsibilities. The section is aimed at shielding Speaker(s) of Parliament from contempt of court in the discharge of their official duties.

93. As I have already pointed out elsewhere in this judgment, courts punish for deliberate and wilful disobedience of their orders or processes. They do not punish one for merely discharge his or her duties. If conduct or actions fall within the definition of contempt, section 35 cannot shield anyone because such conduct is unconstitutional and disrespects the supremacy of the constitution (in

Article 2(1)) and the national values in Articles 4(2) and 10 which bind all persons, state organs, state and public officers in the discharge of their duties. For that reason, "***courts have the power to ensure that their decisions or orders are complied with by all and sundry, including organs of state. And in doing so, courts are not only giving effect to the rights of the successful litigant but also more importantly, by acting as guardians of the constitution, asserting their authority in the public interest." (Nthabiseng Pheko v Ekurhuleni Metropolitan Municipality & Another)*** (supra) The power to punish for contempt being a constitutional power, section35 in so far as it attempts to limit this power, is inconsistent with the constitution and is invalid.

94. On that note, I find it appropriate to quote the following words by ***Kriegler J*** that;

"In our constitutional order the Judiciary is an independent pillar of State, constitutionally mandated to exercise the judicial authority of the State fearlessly and impartially. Under the doctrine of separation of powers it stands on an equal footing with the executive and the legislative pillars of State; but in terms of political, financial or military power it cannot hope to compete. It is in these terms by far the weakest of the three pillars; yet its manifest independence and authority are essential. Having no constituency, no purse and no sword, the Judiciary must rely on moral authority. Without such authority it cannot perform its vital function as the interpreter of the Constitution, the arbiter in disputes between organs of State and, ultimately, as the watchdog over the Constitution and its Bill of Rights – even against the State." (S v Mamobolo [2001] ZACC 17; 2001 (3) SA 409 (CC); 2001 (5) BCLR 449 (CC) (para 16).

95. The import of the impugned Act right from the memorandum and reasons in the Bill, the preamble to the Act and some of its sections clearly undermine the authority and effectiveness of the courts to discharge their constitutional mandate. In ***Samuel G Momanyi v Attorney General & another*** Petition No. 341 of 2011, the court was clear that when an enactment is impugned on the ground that it is ***ultra vires*** and unconstitutional, what has to be ascertained is the true character of the legislation and for that purpose, regard must be had to the enactment as a whole to its effects, purpose, true intention and the scope and effect of its provisions or what they are directed against and what they are aimed at.

96. It is plain to me, that the architecture, design and engineering of the impugned Act was aimed at making courts less effective given that the power to punish for contempt is the single most important tool courts have to ensure that they remain relevant, effective and administer justice to all without fear or favour. Limiting this power can only lead to loss of confidence in the courts and society's rapid degeneration into chaos.

97. In this regard, ***Mahomed CJ***, said;

"..Unlike Parliament or the executive, the court does not have the power of the purse or the army or the police to execute its will. The superior courts and the Constitutional Court do not have a single soldier. They would be impotent to protect the Constitution if the agencies of the state which control the mighty physical and financial resources of the state refused to command those resources to enforce the orders of the courts. The courts could be reduced to paper tigers with a ferocious capacity to roar and to snarl but no teeth to bite and no sinews to execute what may then become a piece of sterile scholarship. Its ultimate power must therefore rest on the esteem with which the Judiciary is held within the psyche and soul of a nation. That esteem must substantially depend on its independence and integrity." ("The Role of the Judiciary in a Constitutional State - Address at the First Orientation Course for New Judges" (1998) 115 SALJ 111 at 112).

Conclusion

98. Having considered the petition, the response, submissions, the constitution and the law, I am persuaded that sections, 30 and 35 of the Contempt of court Act are unconstitutional. I, however, find that the entire fails the constitutional test of validity for lack of public participation and for encroaching on the independence of the judiciary. Consequently and for the above reasons, this petition succeeds and I make the following orders.

1. A declaration is hereby issued that Sections 30, and 35 of the impugned contempt of court Act No 46 of 2010 are inconsistent with the constitution and are therefore null void.

2. A declaration is hereby issued that the entire contempt of court Act No 46 of 2016 is invalid for lack of public participation as required by Articles 10 and 118(b) of the constitution and encroaches on the independence of the Judiciary

3. No order as to costs.

Dated, Signed and Delivered at Nairobi this 9th day of November 2018

E C MWITA

JUDGE