Case Number:	Miscellaneous Criminal Application 57 of 2018
Date Delivered:	15 Feb 2018
Case Class:	Criminal
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Luka Kiprotich Kimaru
Citation:	Miguna Miguna v Director of Public Prosecutions & 2 others [2018] eKLR
Advocates:	-
Case Summary:	**The options available to the Court in resolving a situation where a party was in contempt of Court.** **Miguna Miguna v Director of Public Prosecutions & 2 others** **Misc. Criminal Application No 57 of 2018** **High Court at Nairobi** **Criminal Division** **L Kimaru, J** **February 15, 2018** **Reported by Beryl A Ikamari** ***Civil Practice and Procedure****-contempt of Court-definition of contempt of Court-conduct that would amount to contempt of Court-failure to comply with an order of the Court-Contempt of Court Act, No.*

46 of 2016, section 4(1)(a).

***Civil Practice and Procedure**-contempt of Court-punishment for contempt of Court-circumstances in which the Court would opt not to punish an alleged contemnor despite a finding that the contemnor was in contempt of Court-where the Court opts to give a contemnor an opportunity to purge his contempt-Contempt of Court Act, No. 46 of 2016, section 28.*

***Constitutional Law**-fundamental rights and freedoms-enforcement of fundamental rights and freedoms-right to liberty, right to freedom and security of the person and rights of an arrested person-remedies available for alleged breaches of fundamental rights and freedoms-anticipatory bail-Constitution of Kenya 2010, articles 23(3), 29(a) & 49(1)(f).*

Brief facts

On February 2, 2018, the Applicant was arrested. The Applicant then successfully made an application for release on anticipatory bail. On the same day, February 2, 2018, the High Court ordered him to pay Kshs. 50, 000/= as cash bail. He was also ordered to appear before the High Court on February 5, 2018, if the Respondents intended to charge him with an offence. However, the Applicant was not released as ordered by the Court and on February 5, 2018 he did not appear before the High Court.

On February 5, 2018, the High Court made orders for the Applicant to appear before it at 9.00 a.m. and for the Inspector General of Police and the Director of Criminal Investigation, to appear before the Court personally to show cause why they ought not be punished for being in contempt of the orders of the Court. On February 6, 2018, the High Court was informed that the Applicant was scheduled to appear before the Chief Magistrate's Court at Kajiado to answer to charges. The Chief Magistrate's Court made orders for the police to produce the Applicant before the High Court at 3.00 p.m. on February 6, 2018. On that date at 3.00 p.m., the High Court was informed that by Court orderlies that the Applicant was within the Court precincts in a holding cell. Nonetheless, the

Applicant was not produced before the High Court on that day. The High Court directed that the Applicant be produced before the Court by 11.00 a.m. on February 7, 2018.

On February 7, 2018, the Deputy Director of Public Prosecutions informed the Court that the Applicant had been deported upon receipt of a letter written to the Ministry of Foreign Affairs by the Canadian High Commission. The deportation was undertaken pursuant to a declaration issued by the Cabinet Secretary for Interior and Coordination of National Government under sections 43 and 33(1) of the Kenya Citizenship and Immigration Act 2011. The Canadian High Commission was concerned that they were unable to verify or confirm the wellbeing of the Applicant due to fact that he was being kept incommunicado.

The High Court directed the 2nd and 3rd Respondents to swear affidavits showing the circumstances under which the Applicant was removed from the Court's custody and handed over to the Director of Immigration. The High Court received affidavits from the 2nd and 3rd Respondents and also from the Director of Immigration.

Issues

1. Whether the 2nd and 3rd Respondents failed to comply with Court orders and acted in contempt of Court.
2. What were the consequences of a finding by the Court that a party was in contempt of Court?
3. When would the Court grant an Applicant anticipatory bail?

Held

1. The 2nd and 3rd Respondents said that they did not intend to disobey Court orders but it was apparent that they had engaged in deliberate disobedience of the orders.

They creatively interpreted the orders in order to avoid liability for contempt of Court.

2. The averments in their affidavits confirmed that the 2nd and 3rd Respondent were aware that the orders of the High Court required them to produce the Applicant before the Court to be dealt with in accordance with the law. They were also aware of the orders of the Kajiado Chief Magistrate's Court to produce the Applicant before the High Court on February 6, 2018 by 3.00 p.m. The Office of the Director of Public Prosecutions was represented in Court and communicated to the 2nd and 3rd Respondents about the orders that the High Court issued.
3. The 2nd and 3rd Respondents claimed to have complied with the orders of the High Court but instead of producing the Applicant before the Court at 3.00 p.m. on February 6, 2018, they released him at the Inland Container Depot Police Station at Embakasi on that day at 6.00 p.m. Therefore the 2nd and 3rd Respondents acted in contempt of Court.
4. The 2nd and 3rd Respondents were mandated under article 232 of the Constitution to uphold, *inter alia*, high standards of professional ethics, responsiveness, promptness, effectiveness, impartiality and equity in the provisions of service to the public. They were also required to be accountable for their administrative actions done in the course of their duties. Additionally the national values and principles of governance as espoused in article 10(2) of the Constitution required the 2nd and 3rd Respondents, in the course of their duties, to respect human dignity, equity, social justice, inclusiveness, and equality.
5. The Applicant made the application for anticipatory bail to secure his liberty and to enforce his right to freedom and security of the person and the right not to be deprived of freedom arbitrarily or without just cause as recognized in article 29(a) of the Constitution. The Court's jurisdiction to grant anticipatory bail was based on the

Constitution. Anticipatory bail would be an appropriate remedy for a person constantly subjected to harassment and in fear of being unjustifiably arrested. It was available as an appropriate relief fashioned by the Court for purposes of enforcing fundamental rights and freedoms.

6. Under article 49(1)(f) of the Constitution, after being arrested, the Applicant had the right to be brought before a Court as soon as reasonably possible, but not later than twenty-four hours after being arrested; or if the twenty-four hours ended outside ordinary Court hours, or on a day that was not an ordinary Court day, the end of the next Court day.
7. The Applicant was arrested in February 2, 2018. On the day of his arrest he was granted anticipatory bail for his release with directions that he would present himself before Court on February 5, 2018. February 2, 2018 was on a Friday. Despite being required to release the Applicant on February 2, 2018, the 2nd and 3rd Respondents did not release him. After being served with the Court orders they ought to have released the Applicant on February 3, 2018 or February 4, 2018 but they did not.
8. When the matter was mentioned before the High Court on February 5, 2018, the 2nd and 3rd Respondents did not present the Applicant before court as required under article 49(1)(f) of the Constitution. That was the reason why the High Court directed the 2nd and 3rd Respondent to appear before the Court on February 6, 2018 and present the Applicant to the Court so that he could be dealt with in accordance with the law. On February 6, 2018, in spite of the order issued by the High court, twice during the same day, the 2nd and 3rd Respondents did not present the Applicant before Court so that he could be released in accordance with the orders of the Court.
9. Contempt of Court proceedings were necessary for the rule of law and administration of justice to be effective and efficacious in securing compliance with the

orders of the Court. Failing to comply with Court orders was a form of contempt of Court. Under section 4(1)(a) of the Contempt of Court Act 2016, contempt of Court included civil contempt which meant wilful disobedience of any judgment, decree, direction, order or other process of a Court or wilful breach of an undertaking given to a Court.

10. When the High Court found that the 2nd and 3rd Respondents were apparently in contempt of Court, it required them required to personally appear before the Court to show cause why they acted in contempt of the orders of the Court and why they ought not be punished for being in contempt. They were also required to swear affidavits explaining how the Applicant was removed from the Court's custody and handed over to the Director of Immigration. Asking the 2nd and 3rd Respondents to show cause was in fulfilment of the duty of the Court to give a hearing before issuing a final verdict on contempt.
11. Section 28 of the Contempt of Court Act provided for the punishment that would be meted out where a person was convicted for contempt of the orders of the Court. The punishment included a fine not exceeding two hundred thousand shillings or imprisonment for a term not exceeding six months, or both. Additionally, such a person could be detained in police custody until the rising of the Court.
12. The Court had other options for purposes of securing respect of Court orders and meeting the ends of justice. The Court could direct the contemnor to take positive action to purge the contempt.
13. The 2nd and 3rd Respondents would be granted an opportunity to purge the contempt of the orders of the Court. Committing the 2nd and 3rd Respondents to prison would not serve the ends of justice in the particular circumstances of this case.
14. The Court had power to hold accountable third parties who assisted primary contemnors to commit contempt of Court. It was clear that the 2nd and 3rd

Respondents acted together with the Director of Immigration to defeat the orders of the High Court that required the 2nd and 3rd Respondents to produce the Applicant before the Court. It is trite that any action done in contempt of the orders of the Court is illegal and could not be given recognition in the eyes of the law. It was evident that the action taken by the Director of Immigration in furtherance of the contempt of the orders of the High Court was illegal, null and void and did not have any legal effect.

The 2nd and 3rd Respondent guilty of contempt of Court.

Orders: -

1. *The declaration dated February 6, 2018 issued by Fred Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government, in respect of the Applicant, on the advice of the Director of Immigration, under section 33(1) of the Kenya Citizen and Immigration Act 2011 was declared null and void and of no legal effect because it was issued in contempt of the orders of the Court.*
2. *The declaration dated February 6, 2018 issued by Fred Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government in respect of the Applicant, on the advice of the Director of Immigration, under section 43 of the Kenya Citizenship and Immigration Act 2011 was declared null and void and of no legal effect because it was issued in contempt of the orders of the Court.*
3. *The valid Kenyan Passport of the Applicant had to be surrendered to the Deputy Registrar of the Court by the Director of Immigration within seven (7) days of the Ruling. That Passport had to be dealt with by the Court with jurisdiction in accordance with the law.*
4. *The 2nd and 3rd Respondents had to personally give a written undertaking to the Court that they would comply and give*

	effect to the orders of the Court. The undertakings would have to be presented to the Court within seven (7) days of the Ruling. 5. *For avoidance of doubt, upon compliance with the orders of the Court, the 2nd and 3rd Respondents and the Director of Immigration would be at liberty to defend the validity of their actions before a Court of competent jurisdiction.* 6. *Leave was granted to the 2nd and 3rd Respondents and any aggrieved party to appeal against the decision of the Court.*
Court Division:	Criminal
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	-
History County:	-
Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CRIMINAL DIVISION

MISC. CRIMINAL APPLICATION NO.57 OF 2018

MIGUNA MIGUNA.....APPLICANT

-VERSUS-

THE DIRECTOR OF PUBLIC PROSECUTIONS.....1ST RESPONDENT

THE DIRECTOR OF CRIMINAL INVESTIGATIONS.....2ND RESPONDENT

THE INSPECTOR GENERAL OF POLICE……3RD RESPONDENT

RULING

The Applicant, Miguna Miguna was arrested on 2nd February 2018 by the Police. On the same day, he filed an application before this court seeking his release on anticipatory bail pending his production before court. This court (Wakiaga J), upon certifying the application urgent, ordered that the Applicant be released on anticipatory bail upon paying a cash bail of Kshs.50,000/-. If the Applicant was released as ordered by the court, he was required to appear in person before the court on 5th February 2018. The court made the following further order:

"In the alternative, should the Respondents intend to charge the Applicant with any known offence, then the same is to appear before the said court as soon as required if it is to be before his appearance before this court."

The court further ordered the 2nd Respondent to be personally served with the order. From the court record, it was apparent that the Respondents were served as ordered by the court.

The Applicant was not released as ordered by the court. When the parties appeared before this court on 5th February 2018, it became apparent that, in compliance with the above order, the Applicant had not been produced before the court. This court reiterated the orders that were issued by the court on 2nd February 2018 and directed that the Applicant be produced before the court by the 2nd and 3rd Respondents. The court required personal attendance of the 2nd and 3rd Respondents in court to give an explanation why the Applicant had not been presented before court so that he could be dealt with in accordance with the law. The court listed the application for hearing on 6th February 2018. This court stated the following in its Ruling:

"***It is apparent that the Inspector General of Police and the Director of Criminal Investigation are in contempt of the orders of this court. Article 49(1) of the Constitution sets out certain non-derogable rights in relation to an arrested person. That right includes the right for an arrested person to be produced in court within 24 hours of his arrest to be charged or in the alternatively he be released."***

The court further stated thus:

"In the circumstances therefore, to remedy the situation, this court orders the Inspector General of Police, Mr. Joseph Boinnet and the Director of Criminal Investigation, Mr. George Kinoti to appear before this court personally to show cause why they should not be punished for being in contempt of the orders of this court. They are further ordered to personally produce the Applicant, Miguna Miguna before this court so that he can be dealt with in accordance with the law. This appearance shall be made on 6th February 2018 at 9.00 a.m. The Director of Public Prosecution to serve the order of this court. It is so ordered."

When the parties appeared before court on 6th February 2018, the court was informed by Mr. Mutuku, the Deputy Director of Public Prosecutions that the 2nd and 3rd Respondents had been duly served as ordered by the court. They had sent two representatives to represent them in court. More importantly, the court was informed that the Applicant was scheduled to appear before the Chief Magistrate's Court at Kajiado. A copy of the draft charge sheet was presented to court. The Applicant's counsel and the counsel for the Law Society of Kenya were not impressed by the failure of the 2nd and 3rd Respondents to produce the Applicant before court. This court sought to confirm that indeed the Applicant had been presented to court. The court adjourned its session to 12.30 p.m. to confirm that the Applicant had been presented before that court. At that time, Mr. Mutuku told the court that the Applicant had been presented before Hon. Edwin Mulochi, Resident Magistrate. At the time, parties were making presentations before that court on whether the Applicant should take plea in view of the order that had earlier been issued by this court to the effect that the Applicant be presented before it. Meanwhile, this court reserved the delivery of its Ruling on the submission that had earlier been made before it for 2.30 p.m., on the same day.

After hearing the parties, Hon. Edwin Mulochi rendered his Ruling in the following terms:

"1. The Police do produce the accused/suspect before the High Court at Nairobi before 3 p.m. today.

2. Once the issue pending are conclusively thrashed out by the High Court, the accused can be brought to this court for plea on 14th February 2018."

Pursuant to this order, the Applicant was required to be produced before this court by 3.00 p.m. This court rendered its second Ruling in this matter at about 3.30 p.m. At that time, the court orderlies informed the court that indeed the Applicant had been brought to the holding cells within the court precincts. This court ordered the Applicant to be released on the basis of the cash bail of Kshs.50,000/- that he had paid on 2nd February 2018. Concern was raised by counsel for the Applicant that there was possibility that the 2nd and 3rd Respondents may not comply with the orders of this court by producing the Applicant before court. This court assured the parties that it would not leave the court premises until it had been confirmed that the Applicant had been released.

As is now common knowledge, this court waited within the court premises until 6.50 p.m. when it became apparent that the 2nd and 3rd Respondents would not produce the Applicant. Mr. Ondimu for the State told the court the following:

"***I got information from the Director CID. He is out of town. He was unable to reach them through their mobile phones. He has not been able to tell us where the Applicant is. I have not got in touch with O/C Flying Squad. I have (been) trying to call him to confirm if the Applicant has been brought. He has not responded. We have no information as to the whereabout of the Applicant."***

On the basis of this information, this court wrote the third Ruling in the matter. It made the following

order:

"It is apparent that the 2nd and 3rd Respondent are in contempt of the orders of this court. They have refused or failed to surrender the Applicant to this court so that he can be released in terms of the orders issued today. It is clear that unless this court takes appropriate remedial action, the 2nd and 3rd Respondents will continue to treat the orders of this court with impunity."

The court directed the Applicant to be produced to this court by 11.00 a.m. on 7th February 2018. The court also suspended any criminal proceedings against the Applicant pending his presentation before court. The 3rd Respondent and Mr. Said, the Officer In-charge Flying Squad were ordered to personally present the Applicant before court.

On 7th February 2018, Mr. Mutuku, the Deputy Director of Public Prosecution told the court that the Applicant had been deported from the country the previous night pursuant to a declaration issued by Fred Matiang'i, the Cabinet Secretary for Interior and Coordination of National Government pursuant to **Sections 43** and **33(1)** of the **Kenya Citizenship and Immigration Act 2011**. The copies of the declaration were presented to court as evidence that the Applicant was no longer within the jurisdiction of the court. The declarations were dated 6th February 2018. It was clear from the submission made by Mr. Mutuku that the Applicant was deported upon receipt of a letter written to the Ministry of Foreign Affairs by the Canadian High Commission.

The letter was received on the same 6th February 2018. In the letter, the High Commission requests the Kenya Government to allow its officers access to see the Applicant in view of the fact that the Applicant was a Canadian Citizen. The High Commission was concerned that they were unable to verify or confirm the wellbeing of the Applicant due to fact that he was being kept incommunicado. The Applicant's counsel urged the court to take appropriate action to uphold the authority of the court in light of the fact that it was obvious that the 2nd and 3rd Respondents had breached the orders of this court requiring them to produce the Applicant before the court.

In its fourth Ruling in this matter, this court directed the 2nd and 3rd Respondents and the Director of Immigration Major Gen. (Rtd) Gordon O. Kihalangwa to swear affidavits to indicate the circumstances under which the 2nd and 3rd Respondents removed the Applicant from the custody of the court and handed him over to the Director of Immigration. The court further made the following orders:

"The 2nd Respondent, Mr. George Kinoti and the 3rd Respondent, Mr. Joseph Boinnet must further swear affidavits to show cause why they should not be punished in accordance with the Contempt of Court Act for disobeying the orders of this court. They are required to appear before this court in person on 15th February 2018 at 9.00 a.m. to show cause."

The proceedings were adjourned to today when the 2nd and 3rd Respondents are required to be present before court. Meanwhile, this court did receive the affidavits sworn by Joseph Kipchirchir Boinnet, the Inspector General of Police, George Kinoti, the Director of Criminal Investigations and Maj. Gen (Rtd) Dr. Gordon Kihalangwa, the Director of Immigration.

In the said affidavits, it was clear to this court that the 2nd and 3rd Respondents, though stating that they had no intention or had never had the intention to disobey the orders of this court, that they had indeed deliberately disobeyed the orders of this court by creatively interpreting the orders to avoid liability for contempt of court. The 2nd Respondent swore as follows:

"12. THAT by the time I was made aware of the existence of the 3rd Ruling, I had already been

informed by the DCI that he had given instructions that the Applicant be released pursuant to the directions issued by this Honourable Court directing his release on a Kshs.50,000/- cash bail."

The 3rd Respondent George Kinoti swore the following paragraphs in his affidavit:

"13. THAT by the time I was being made aware of the existence of the 3rd Ruling, I had already given instructions that the Applicant be released by the officers who had escorted him to Kajiado Chief Magistrate's Court pursuant to the directions issued by this Hon. Court for his release on a Kshs.50,000/- cash bail. I am aware that the Applicant was released at about 18.00 hours as per the attached OB.

14. THAT I was informed by my officers that the Applicant was released vide OB/6/2/18 at the Inland Container Depot (ICD) Police Station pursuant to the orders issued by this court."

In his affidavit, Maj. Gen. (Rtd) Gordon Kihalangwa told the court that he brought to the attention of the Cabinet Secretary the fact that the Applicant was a Canadian citizen at the time he applied to be granted a Kenyan Passport. This is what he said:

"5. THAT the Cabinet Secretary In-charge of Immigration matters on the 6th day of February 2018 issued a declaration under Section 33(1) and 43 of the Kenya Citizenship and Immigration Act 2011 (refer to a copy of the declaration herewith attached and marked as annexture "GK6 and GK7").

6. THAT pursuant to the orders referred to in paragraph 6, I instructed my officers on the 6th of February 2018 to ensure that the orders be effected.

8. THAT on 6th February 2018 the Applicant herein was arrested within the precincts of Inland Container Depot – Embakasi and taken to Jomo Kenyatta International Airport for purposes of deportation and did board KLM Airline Flight Number KLO566 to Toronto Canada via Amsterdam (refer to a copy of the boarding pass herein attached and marked as an annexture "GK8")

…

10. THAT the Department of Immigration was not party to this application, consequently, we were not aware of the orders of this honourable court as none had been served on the Department. Moreover, if any orders had been brought to the attention of the Department, we will definitely have complied."

It is clear from the affidavits of the 2nd Respondent, 3rd Respondent and the Director of Immigration that if there was any doubt that the 2nd and 3rd Respondents were in contempt of the orders of this court that doubt was absolutely removed by their admission of the action that took. That the 2nd and 3rd Respondents were aware of the orders of this court that required them to produce the Applicant before this court to be dealt with in accordance with the law is confirmed by the averments in their affidavits. The 2nd and 3rd Respondents were aware that pursuant to the orders issued by Hon. Edwin Mulochi at Kajiado Chief Magistrate's Court, the police were required to present the Applicant before this court on 6th February 2018 by 3.00 p.m. The 2nd and 3rd Rulings delivered by this court were categorical that the Applicant was to be presented before the court. In any event, the Office of the Director of Public Prosecutions was represented in court and communicated to the 2nd and 3rd Respondents the orders that this court had issued.

For the 2nd and 3rd Respondents to claim that they had complied with the orders of this court when, instead of producing the Applicant before this court before or at 3.00 p.m., they released him at the Inland Container Depot Police Station at Embakasi at 6.00 p.m.is disingenuous. This court had clearly indicated that the Applicant be produced before this court so that he could be dealt with in accordance with the law. If there was any doubt as to what were the orders in regard to the production of the Applicant before this court, the same was reiterated by Hon. Edwin Mulochi (RM) at Kajiado Chief Magistrate's Court who ordered the police to produce the Applicant before this court for his release on bail. The 2nd and 3rd Respondents acted in contempt of the clear orders of this court and this court so finds.

As public officers, the 2nd and 3rd Respondents are mandated under **Article 232** of the **Constitution** to uphold, *inter alia*, the following values and principles: high standards of professional ethics, being responsive, prompt, effective, impartial and equitable in the provisions of service to the public. There are also required to be accountable for the administrative actions that they direct in the course of their duties. The 2nd and 3rd Respondents are also bound by the national values and principles of governance as espoused in **Article 10(2)** of the **Constitutio**n that requires the 2nd and 3rd Respondents, in the course of their duties, to respect human dignity, equity, social justice, inclusiveness, equality and respect for human rights. **Article 3(1)** of the **Constitution** provides thus:

"Every person has an obligation to respect, uphold and defend the Constitution."

As regards the implementation of the rights and fundamental freedoms as provided by the Bill of Rights, **Article 21(1)** of the **Constitution** provides that:

"It is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights."

Article 243 of the **Constitution** establishes the **National Police Service** to which the 2nd and 3rd Respondents are members. **Article 244** of the **Constitution** set out the objects and functions of the National Police Service. It includes under **sub-article (b)** the prevention of corruption and promotion and practice of transparency and accountability. Under **sub-article (3),** the Police are required to comply with constitutional standards of human rights and fundamental freedoms and under **sub-article (d)** they are required to respect human rights and fundamental freedoms and human dignity. The National Police Service is further guided by the principles of National Security which includes, as provided under **Article 238(2)(b)** of the **Constitution,** the pursuit:

"…in compliance with the law and with utmost respect for the rule of law, democracy, human rights and fundamental freedoms."

When the Applicant filed the application to be released on anticipatory bail, he was exercising his constitutional right to secure his liberty as provided under **Article 29(a)** of the **Constitution** that grants him the right to freedom and security of person and the right not to be deprived of his freedom arbitrarily or without just course. The Applicant was enforcing his right pursuant to **Article 22(1)** of the **Constitution** that provides that:

"Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, <u>or is threatened"</u> (underlining mine).

The basis of the jurisdiction of the court to grant anticipatory bail is provided by the **Constitution**. As was

held by the court in **W'Njuguna v Republic [2004] 1 KLR 520** at Page 532:

"When a person is constantly subjected to harassment or is in fear of being unjustifiably arrested, he has a right to recourse to the protection of the Constitution through the High Court where its enforcement is provided for by the Constitution. It would indeed be a tragedy, if the Constitution did not provide a remedy to a citizen whose fundamental rights have been breached…For the Respondent to say that a person in such a situation should do nothing because there is no law providing for such a person to seek remedy in court will completely be the antithesis of the spirit of the Constitution which provides for the protection of the fundamental rights and freedoms in the bill of rights. We are further of the humble opinion that the right for anticipatory bail has to be called out when there are circumstances of serious breaches by an organ of the state of a citizen's fundamental right."

The above decision was rendered before the promulgation of the **Constitution** in 2010. Unlike then, the **Constitution** as cited above grants a citizen the right to approach the court for appropriate remedy when his right, as provided under the Bill of Rights, is threatened to be infringed. The reasoning in the above case, applies to the Applicant in this case.

Upon his arrest, pursuant to **Article 49(1)(f)** of the **Constitution**, the Applicant had the right:

"to be brought before a court as soon as reasonably possible, but not later than –

i. Twenty-four hours after being arrested; or

ii. If the twenty-four hours ends outside ordinary court hours, or on a day that is not ordinary court day, the end of the next court day."

The Applicant was arrested on 2nd February 2018. This court issued an order releasing him on anticipatory bail on the same day with directions that he presents himself before court on 5th February 2018. 2nd February 2018 was a Friday. The 2nd and 3rd Respondents were required to release the Applicant on that 2nd February 2018. They did not. Since they were served, they ought to have released him on 3rd February 2018 or 4th February 2018. They did not.

When the matter was mentioned before this court on 5th February 2018, the 2nd and 3rd Respondents did not present the Applicant before court as required under Article **49(1)(f)** of the **Constitution**. That is the reason why the court directed the 2nd and 3rd Respondent to appear before the court on 6th February 2018 and present the Applicant to the court so that he could be dealt with in accordance with the law. On 6th February 2018, despite of the order issued by this court, twice during the same day, the 2nd and 3rd Respondents did not present the Applicant before court so that he could be released in accordance with the orders of the court.

In its second Ruling delivered on 6th February 2018, this court observed the following at Page 5:

"It was clear to this court that the 2nd and 3rd Respondents acted in clear breach of the orders of this court issued on 2nd February 2018 that required them to release the Applicant from their custody pending further orders of the court on 5th February 2018. It is not for the Respondents to interpret the legality or the veracity of the order issued by this court. It is not open for the Respondents to choose whether or not to comply with the orders issued by this court. As public officers, the 2nd and 3rd Respondents are required to lead by example by obeying orders issued by this court. The 2nd and 3rd Respondents cannot purport to enforce the law by breaking the law.

They acted clearly in contempt of the orders of this court by detaining the Applicant in breach of the orders issued by this court."

This court finds that the 2nd and 3rd Respondents are in contempt of the orders of this court.

Section 4(1)(a) of the **Contempt of Court Act 2016** provides as follows:

"***Contempt of Court includes civil contempt which means willful disobedience of any judgment, decree, direction, order or other process of a court or willful breach of an undertaking given to a court."***

Section 4(2) of the **Act** states that:

*"I**n any case not related to civil or criminal proceedings as contemplated under subsection (1), an act that is willfully committed to interfere, obstruct or interrupt the due process of the administration of justice in relation to any court, or to lower the authority of a court, or to scandalize a judge, judicial officer in relation to any proceedings before the court, or on any other manner constitutes contempt of court."***

In the legal treatise ***"Arlidge, Eady & Smith on Contempt"*** 3rd Edition published by ***Thomson Sweet and Maxwell*** at Page 144, the authors had this to say in respect of the distinction between civil and criminal contempt of court:

"Thus, although "civil contempt" is concerned with breaches of court orders or undertakings in civil litigation, which were originally for the benefit of one or other of the parties, the court may wish in such cases to coerce parties into compliance with its orders; or alternatively, even in the context, it may be primarily concerned to punish disobedience (where the time for compliance has passed). In such circumstances as these, deterrence clearly has a role to play. It is therefore possible, in many examples of civil contempt, to discern these various policy considerations in operation alongside one another.

This was explained by Cross J., for example, in *Phonographic Performance Ltd v Amusement Caterers***. *A company and its directors were restrained by injunction from playing certain gramophone records on its juke boxes. The records continued to be played. The judge took the view that the directors of the company were deliberately defying the court:***

"Where there has been willful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt, what is called 'contempt of procedure', bears a twofold character implying as between the parties to proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the State, a penal or disciplinary jurisdiction to be exercised by the court in the public interest"

Similarly, in *Jennison v Baker Salmon L. J***. *made the important point that:***

"*The public at large no less than the individual litigant have an interest and a very real interest in justice being effectively administered".*

So too the duality was emphasized by Megarry J. in *Re Grantham Wholesale Fruit, Vegetable and Potato Merchants Ltd:*

"In this type of case a motion for committal is, of course, a means of putting pressure on the contemnor to obey the order, but it is not this alone: it is also a means of imposing any penalty thought proper in respect of the contempt that has already been committed."

In the context of a breach of interdict Lord President Clyde in *Johnson v Grant* ***drew a similar distinction:***

"…not only has no one the power to purge himself of a deliberate offence by saying he is sorry, but the mere circumstance that he presents a belated expression of contrition has, with regard to the public aspect of the matter, almost no importance at all… The appeal is simply to the clemency of the Court; there is no palliative of the offence at all; and the idea must not be harboured that a person who has willfully committed a breach of interdict can obtain remission of sentence by coming to court and saying, 'I realize my transgression and apologise for it' – however sincerely such an apology may be made."

In **Katsuri Limited v Kapurchand Depar Shah [2016] eKLR** in defining contempt of court held:

"***According to*** *Black's Law Dictionary***,**

(14) "Contempt is a disregard if, disobedience to, the rules, or orders of a legislative or judicial body, or an interruption of its proceedings by disorderly behavior or insolent language, in its presence or so near thereto as to disturb the proceedings or to impair the respect due to such a body."

In ***Halsbury's Laws of England*** it is stated:

"***It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such an order would as a general rule result in the person disobeying it being in contempt and punishable by committal or attachment….an application to court by him not being entertained until he had purged his contempt***"

In book *The Law of Contempt* ***(15) learned authors Nigel Lowe & Brenda Sufrin*** state as follows:-

"Coercive orders made by the courts should be obeyed and undertakings formally given to the courts should be honoured unless and until they are set aside. Furthermore it is generally no answer to an action for contempt that the order disobeyed or the undertaking broken should not have been made or accepted in the first place. The proper course if it is sought to challenge the order or undertaking is to apply to have it set aside."

In **Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & Another(16)** Ibrahim J (as he then was) stated as follows:-

"It is essential for the maintenance of the Rule of Law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against or in respect of whom, an order is made by Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void."

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

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

It is clear from the above narrative that contempt of court proceedings are necessary for the rule of law and administration of justice to be effective and efficacious in securing compliance with the orders of the court.

What are the consequences where the court makes a finding that a party has been in contempt of the orders of the court"

In the present case, this court found the 2nd and 3rd Respondents in contempt of the orders of the court on 7th February 2018. To understand why the 2nd and 3rd Respondents, being the seniormost officers in the Police Service acted in blatant breach of the orders issued by this court to produce the Applicant before it, the court required the 2nd and 3rd Respondents to swear affidavits to give an explanation how custody of the Applicant was, firstly, removed from the court, and secondly, how the custody of the Applicant was handed over to the Director of Immigration. The Director of Immigration was also required to explain in an affidavit how he took custody of the Applicant when he was under the custody of the court. In compliance with the order of this court, the said affidavits were duly filed.

The 2nd and 3rd Respondents were further required to personally appear before the court to show cause why they acted in contempt of the orders of the court and why they should not be punished for being so in contempt. The court requested the presence of 2nd and 3rd Respondents to fulfill the legal obligation placed upon it to require any person who is supposed to face penal sanctions to extenuate to the court before the court gives its verdict. It is the choice of the 2nd and 3rd Respondents to appear before court and make such presentation before the court makes its final orders. If the 2nd and 3rd Respondents choose not to appear before court and give their extenuating circumstances, the court would have fulfilled its legal obligation of giving the 2nd and 3rd Respondents a chance and a hearing before giving its final verdict.

As top police officers, the 2nd and 3rd Respondents are required to be at the forefront in respecting summons issued to them to appear before court. The entire criminal justice system would collapse if bonded witnesses fail to appear before court to give evidence just because they are of the view that they can choose to or not to present themselves before court. The 2nd and 3rd Respondents' work as law enforcers would be much more difficult if bonded witnesses did not appear before court. Since the court has fulfilled its legal obligation to give the 2nd and 3rd Respondents a chance to be heard before its final orders, it would proceed at set out the options available to it after making the finding that there was contempt of the orders of court.

Section 28 of the **Contempt of Court Act**, sets out the punishment that should be meted in the event that a person is convicted for contempt of the orders of the

court. It provides thus:

"(1) Save as otherwise expressly provided in this Act or in any other written law, a person who is convicted of contempt of court is liable to a fine not exceeding two hundred thousand shillings or to imprisonment for a term not exceeding six months, or to both.

(2) Without prejudice to subsection (1), the court may order that the accused person be detained in police custody until the rising of the court.

(3) A court may at any time revoke an order of committal made under subsection (2) and, if the offender is in custody, order his discharge.

(4) Subject to subsection (1), the accused may be discharged or the punishment awarded may be remitted on apology being made to the satisfaction of the court.

(5) Notwithstanding anything contained in any law for the time being in force, no court shall impose a sentence in excess of that specified in subsection (1) for any contempt either in respect of that court or of a court subordinate to it.

(6) Notwithstanding anything contained in this section, where a person is found guilty of civil contempt, the court may if it considers that the fine will not meet the ends of justice and that imprisonment is necessary direct that the person be detained in civil jail for such period not exceeding six months as the court may deem fit."

Under the above **Act**, the court has the option of either imposing a fine or give a custodial sentence or both.

The court has other options to secure the respect of court orders and meet the ends of justice. The court may direct the contemnors to take positive action to purge the contempt. In the circumstance of this case, this court will exercise the third option as imposing a fine or committing the 2nd and 3rd Respondents to prison may not serve the ends of justice in the particular circumstances of this case. In that regard, this court will not convict the 2nd and 3rd Respondents but will give them an opportunity to assist the court in purging the contempt of the orders of the court that they have been found by this court to have committed.

Earlier in this Ruling, this gave a narration of the events that transpired since the arrest of the Applicant to his deportation on 6th February 2018. It was evident that the 2nd and 3rd Respondents illegally held the Applicant in custody from the 2nd February 2018 to 6th February 2018 when, contrary to the specific orders of this court, they handed the custody of the Applicant to the Director of Immigration. In his affidavit, Maj. Gen. (Rtd) Dr. Gordon Kihalangwa deponed that he did not act in breach of the orders of this court because he was not party to these proceedings, and further, that he was not aware of the orders that had been issued by this court. This court's evaluation of the facts before this court clearly leads it to make the following findings:

I. The National Police Service and the Directorate of Immigration are both under the Ministry of Interior and Coordination of National Government.

II. The event that triggered the Applicant's deportation was the letter written by the Canadian High Commission to the Ministry of Foreign Affairs raising concern of the Applicant's detention and the fact that he was not being treated in accordance with the law.

III. The letter was received by the Ministry of Foreign Affairs on 6th February 2018. It is instructive that this letter was produced before this court by the Director of Immigration on 7th February 2018 in a bid to justify the action that he had taken to have the Applicant deported.

IV. The Director of Immigration in his affidavit swore that he gave advice to the Cabinet Secretary In-charge of Immigration (Ministry of Interior and Coordination of National Government) to have the Applicant declared a prohibited immigrant, and further, to withdraw his citizenship and consequently his Kenyan passport.

V. It was clear to this court that the Director of Immigration would not have had the custody of the Applicant if the 2nd and 3rd Respondents had not facilitated it.

VI. The Director of Immigration, being aware of the contents of the letter written by the Canadian High Commission, was aware that at the time i.e. 6th February 2018, the Applicant was under the custody of the 2nd and 3rd Respondents who had been directed to produce the Applicant before court.

VII. The Director of Immigration cannot therefore claim he was not aware of the orders of this court or that he was not aware that the Applicant was required to be produced before this court to be dealt with in accordance with the law.

VIII. It was clear from the affidavits sworn by the 2nd and 3rd Respondents and the Director of Immigration that the three officers acted in concert and in a coordinated manner to defeat the ends of justice.

XI. The court reached this finding on the following basis:

(a) The 2nd and 3rd Respondents were already in contempt of the orders of this court when they retained custody of the Applicant on 6th February 2018.

(b) When the officers under the 2nd and 3rd Respondents command took the Applicant to Kajiado Chief Magistrate's Court, Hon. Edwin Mulochi (RM) directed the officers to produce the Applicant before this court by 3.00 p.m. on the said 6th February 2018 so that he could be dealt with in accordance with the law.

(c) That order was specific: the police officers under the command of the 2nd and 3rd Respondents were at that time holding the Applicant as a ward of the court. The Applicant was no longer under the custody of the Police since the Applicant had already been produced before court.

(d)The said police officers were at that time bound by the order issued by Hon. Edwin Mulochi (RM) to produce the Applicant before this court.

(e) When this court held its session at about 3.00 p.m. on 6th February 2018, it was informed that the police officers in question were on the way bringing the Applicant to be presented before this court as ordered by Hon. Edwin Mulochi (RM). In fact, the court was told that the Applicant was already in the court precinct.

(f) The 2nd and 3rd Respondents, as already earlier stated, acted in contempt of the orders of this court by failing to produce the Applicant before this court for the purposes of the Applicant being dealt with in accordance with the law.

(g) That the 2nd and 3rd Respondents were acting in coordination with the Director of Immigration.

(h) The decision by the 2nd and 3rd Respondents to take the Applicant to the Inland Container Depot Police Station at Embakasi instead of producing him before the court was with a view to facilitating the Director of Immigration to have his custody.

(i) It was not fortuitous or by chance that officers under the Director of Immigration ***"found***" the Applicant at the precinct of the said Inland Container Depot Police Station. This was planned. It was also in contempt of the orders of this court.

It appeared that the Director of Immigration was labouring under the illusion that since he was not a party to these proceedings, and further since he purported not to be ***"aware"*** of the orders of the court, then he would act with impunity and take custody of the Applicant. As stated earlier in this Ruling, both the Directorate of Immigration and the National Police Service are under the Cabinet Secretary, Ministry of Interior and Coordination of National Government. The Director of Immigration got access to copy of the letter written by the Canadian High Commission to the Ministry of Foreign Affairs. He got access to the letter the same day that it was received because he is working for government which he has collective responsibility for its action. He acted upon it even when he knew that the Applicant was under the custody of this court.

This court has power to hold accountable third parties who, in furtherance of contempt of the orders of court, assist the primary contemnors to commit contempt. In **Eliud Muturi Mwangi (Practising) in the name and style of Muturi & Company Advocates) v LSG Lufthansa Services Europa/Africa GMBH & another [2015] eKLR,** the court held thus:

"[18] The law is that any person who has committed an act of contempt of court is liable for indictment. Therefore, even third parties who are not parties in a suit may be committed for contempt of court and classic examples are contempt on the face of the court, contempt by officers of a company or corporation, contempt by persons who are claiming under the title of a party in a suit or as assigns or successors in title."

The court of Appeal in **Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR** reiterated the importance of respect for orders of the court and the obligation by both parties to the suit and third parties who may be beneficiaries of acts undertaken in contempt of orders of the court. In that case, the court held that the orders earlier issued stopping the transfer of a property to a third party still held even though the property may have been transferred to third parties who may not have been aware of the court order.

In the present case, it is clear that the 2nd and 3rd Respondents acted together with the Director of Immigration to defeat the orders of this court that required the 2nd and 3rd Respondents to produce the Applicant before this court so that he could be dealt with in accordance with the law. It is trite that any action done in contempt of the orders of the court is illegal and has no capacity of being given recognition in the eyes of the law. It is evident that the action taken by the Director of Immigration in furtherance of the contempt of the orders of this court is illegal, null and void and cannot have any legal effect.

As at 3.00 p.m. on 6th February 2018, the Applicant was required to be presented before this court. In fact, at that time, although the Applicant was under the custody of the Police, he was a ward of this court pursuant to the order issued by Hon. Edwin Mulochi (RM) at Kajiado Chief Magistrate's Court. This court is of the view that to remedy with the contempt of the orders of this court, it shall give orders that shall give the 2nd and 3rd Respondents and the Director of Immigration the opportunity to purge the contempt, and in the process, assert the authority of this court. The only way that the 2nd and 3rd Respondents and

the Director of Immigration can purge the contempt of the orders of this court is by restoring the *status quo* as it existed as at 3.00 p.m. on 6th February 2018.

Mrs. Alice Chege is my daughter's favourite teacher at Alliance Girl's High School. When the performance of a student who normally performed well drops, she usually makes the following statement: we must restore the factory settings. This is in allusion to a mobile phone whose software has been corrupted and for it to function again, its setting must be restored to the factory setting. In Mrs. Alice Chege's situation, it means that the student must strive to improve her performance to be as it was before. In the circumstances of this case, to purge the contempt of the orders of this court, the *status quo ante* must be restored.

These are the orders that this court shall make to give the opportunity to the 2nd and 3rd Respondents to purge the contempt of the orders of this court:

(1) The declaration dated 6th February 2018 issued by Fred Matiang'i, Cabinet Secretary, Ministry of Interior and Coordination of National Government, in respect of the Applicant, on the advice of the Director of Immigration, under **Section 33(1)** of the Kenya **Citizen and Immigration Act 2011** is hereby declared null and void and of no legal effect because it was issued in contempt of the orders of this court.

(2) The declaration dated 6th February 2018 issued by Fred Matiang'I, Cabinet Secretary, Ministry of Interior and Coordination of National Government in respect of the Applicant, on the advice of the Director of Immigration, under **Section 43** of the **Kenya Citizen and Immigration Act 2011** is hereby declared null and void and of no legal effect because it was issued in contempt of the orders of this court.

(3) The valid Kenyan Passport of the Applicant shall be surrendered to the Deputy Registrar of this court by the Director of Immigration within seven (7) days of this Ruling. That Passport shall be dealt with by the court with jurisdiction in accordance with the law.

(4) The 2nd and 3rd Respondents shall personally give a written undertaking to this court that they shall comply and give effect to the orders of this court. The undertakings shall be presented to this court within seven (7) days of this Ruling.

(5) For avoidance of doubt, upon compliance with the orders of this court, the 2nd and 3rd Respondents and the Director of Immigration are at liberty to defend the validity of their action before a court of competent jurisdiction.

(6) Leave is granted to the 2nd and 3rd Respondents and any aggrieved party to appeal against the decision of this court.

It is so ordered.

DATED AT NAIROBI THIS 15TH DAY OF FEBRUARY 2018

L. KIMARU

JUDGE