

**A CRITICAL REVIEW OF ENFORCEMENT OF CIVIL COURT ORDERS IN KENYA WITH  
SPECIAL REFERENCE TO CONTEMPT OF COURT**

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## TABLE OF CONTENTS

DECLARATION OF ORIGINALITY .....	VII
DEDICATION .....	IX
ACKNOWLEDGMENTS .....	X
ACRONYMS AND ABBREVIATIONS .....	XI
LIST OF CASES .....	XIII
Kenyan Cases .....	xiii
United Kingdom Cases .....	xv
New Zealand Cases .....	xvii
Canadian Cases .....	xvii
LIST OF STATUTES .....	XVIII
Kenyan Statutes .....	xviii
United Kingdom Statutes .....	xviii
New Zealand Statutes .....	xviii
CHAPTER 1: INTRODUCTION.....	1
1.0 Background .....	1
1.2 Theoretical and Conceptual Framework .....	8
1.2.1 Theories.....	8
1.2.2 Concepts.....	10

1.3 Literature Review.....	12
1.4 The Objectives of the Research .....	19
1.5 Hypothesis.....	19
1.6 Research Questions.....	19
1.7 Methodology .....	20
1.8 Chapter Breakdown .....	21
<b>CHAPTER 2: ORIGINS AND DEVELOPMENT OF THE LAW OF CONTEMPT OF COURT .....</b>	<b>24</b>
2.0 Introduction.....	24
2.1 The Origins and Nature of the Doctrine of Contempt of Court in England .....	24
2.2 The Basis for the Law of Civil Contempt of Court. ....	30
2.3 Salient Features of Civil Contempt of Court .....	34
2.3.1 Clarity .....	36
2.3.2 Service.....	36
2.3.3 Penal Notice .....	36
2.3.4. Leave.....	37
2.3.5 The Application .....	37
2.4 Practice and Procedure.....	38
2.6. The Current State of the Law of Civil Contempt in England .....	39
2.6.1 Service.....	40

2.6.2. Penal Notice .....	41
2.6.3 Leave.....	41
2.6.4 The Application .....	42
2.6.5 The Hearing .....	43
2.7 Conclusion .....	44
CHAPTER 3: THE LAW OF CIVIL CONTEMPT OF COURT IN KENYA .....	45
3.0 Introduction.....	45
3.1 Juridical Basis for the Law of Civil Contempt of Court in Kenya .....	46
3.2 The Jurisdictional Basis for Civil Contempt of Court in Kenya.....	49
3.3. The Kenyan Jurisprudence on Civil Contempt of Court prior to 2012.....	52
3.3.1 Leave to file Contempt of Court Proceedings.....	52
3.3.2 Notice upon the Attorney General .....	56
3.3.3 Personal Service.....	58
3.3.4 Notice of Penal Consequences.....	59
3.3.5 Standard of Proof .....	60
3.4. The Kenyan Jurisprudence Post 2012.....	62
3:5 Practitioner Views.....	64
3.6 Conclusion .....	67
CHAPTER 4: A CRITIQUE OF THE CONTEMPT OF COURT BILL, 2013.....	69

4.0 Introduction.....	69
4.1 The Juridical Basis for the Contempt of Court Bill, 2013 .....	70
4.2 Contempt of Court under the Bill .....	70
4.2.1 Definition of Civil Contempt of Court.....	71
4.3 Jurisdiction of Courts.....	71
4.3.1. Superior Courts .....	72
4.3:2. Subordinate Courts .....	72
4.4 The Limitations of the Contempt of Court Bill, 2013 .....	73
4.4:1 The Power to Punish for Civil Contempt of Court by Superior Courts.....	73
4.4:2 The power to Punish for Civil Contempt by Subordinate Courts.....	75
4.4:3 Limitations of Actions for Contempt of Court .....	76
4.4:4 Punishment for Contempt of Court.....	77
4.4:5 Procedural Defects.....	78
4.5. Conclusion .....	79
CHAPTER 5: SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS .....	80
5.1 Summary of Findings.....	80
5.1.1 Origin and Historical Development of Civil Contempt of Court .....	80
5.1.2 The Law of Civil Contempt of Court in Kenya .....	81
5.1.3 The Contempt of Court Bill, 2013 .....	83

5.2 Conclusions.....	84
5.3 Recommendations.....	87
5.3:1 Need for an autochthonous law of civil contempt of court.....	87
5.3:2 Need for Simplified Procedural Rules.....	88
5.3:3 Empowering Subordinate Courts to Punish for Contempt of Court.....	89
5.3:4 Need for Enhanced Sanctions for Contempt of Court.....	90
APPENDIX 1: RESEARCH TOOL.....	92
Judges Questionnaire .....	92
Advocates Questionnaire .....	98
BIBLIOGRAPHY .....	105
Books .....	105
Dictionaries .....	105
Journals .....	106

## **DECLARATION OF ORIGINALITY**

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in Kenya with Special Reference to Contempt of Court

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This Thesis has been submitted for examination for the award of Master of Laws Degree for which the Candidate was registered with my approval as University Supervisor.

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PROF. MUSILI WAMBUA  
(Supervisor)

## **DEDICATION**

To my late Mother Salome Kemunto, whose hard work, effort and relentless advice saw me through tough times to be what I am today.

To my Dear Wife Rose Gesare Mabeya and my Children who supported me throughout the period of this study. Their encouragement greatly motivated me to complete this study.

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## **ACRONYMS AND ABBREVIATIONS**

AG–Attorney General

ALL ER–All England Law Reports

ANOR–Another

CIV. APPL–Civil Application

CR. APPL - Criminal Application

CRIM. L. R.–Criminal Law Reports

DLR–Dominion Law Reports

DPP–Director of Public Prosecutions

FLR–Family Law Reports

KLR–Kenya Law Reports

LLM–Master of Laws

LWR–Law Weekly Reports

MISC APPL–Miscellaneous Application

NRB–Nairobi

NZLR–New Zealand Law Reports

NZSC–New Zealand Supreme Court

RSC–Rules of the Supreme Court of England

SC–Supreme Court

TR–Times Report

UK–United Kingdom

UR–Unreported

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*Abdalla Dachana Dima v Arid Lands Resource Exploration & Development* [2005] eKLR.

*African Management Communication International Ltd v Joseph Mathenge Mugo* [2013] eKLR.

*Akber Abdullah Kassam Ismail v Equip Agencies Ltd and Others* [2015] eKLR.

*Albert Kigera Karume & 2 Others v Kung'u Gatabaki & Others* [2015] eKLR.

*Andalo & Another v James Gleen Russell Ltd* [1990] KLR 54.

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*Jane Nduta Maina v Muthoni Wa Monica* NRB HC MISC. Appl. No. 234 of 2012 (UR).

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*John Mugo Gachuki v New Nyamakima Co. Ltd* [2012] eKLR.

*Joseph Schilling Bingo (K) Ltd v Star Dust Investments Ltd* CA. No. 134 of 1997 (UR).

*Justus Kariuki Mate & Another v Martin Nyaga Wambora* [2014] eKLR.

*Kariuki & 2 Others v Minister for Gender, Sports, Culture and Social Services and 2 others* [2004] I KLR 588.

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*Loice Margaret Waweru v Stephen Njuguna Githuri* CA No. 198 of 1998 (UR).

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*Margaret Wambogo Nyaga and 2 Others v Clerk of Embu Country Council & 2 Others* [2008] eKLR.

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*Republic v County Council of Nakuru ex-parte Edward Alera t/a Genesis Reliance Equipment & 2 Others* [2011] eKLR.

*Republic v Tony Gachoka & Another* Cr. Appl. No. NAI 4 OF 1999 (UR).

*Shimmers Plaza Ltd v National Bank of Kenya Ltd* [2015] eKLR.

*Simon Kimani v Geoffrey Kimani Gathigi & Another* [2014] eKLR.

*Teachers Service Commission v Kenya National Union of Teachers and 2 Others* [2013] eKLR.

*Titus Munyoki Nzioki v John Kimathi Maingi & Another* [2013] eKLR.

*Tricon International Ltd v Giro Bank Ltd* [2012] eKLR.

*Victoria Pumps and Another v Kenya Ports Authority and 4 Others* [2002] I KLR 709.

*Zedekiah Ochino & Another v George Aura Okombo & Others* [1988] KLR.

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*AG v BBC* [1981] A.C. 303.

*AG v Levens Magazine Ltd* [1979] A.C. 440.

*Attorney General v Times Newspapers Ltd* [1974] A.C. 273.

*Badry v DPP of Mauritius* [1983] 2 A.C. 29.

*Benabo v William Jay & Partners* [1940] 4 ALL ER 196.

*Butler v Butler* [1992] 4 ALL ER 833.

*Catmer v Knatchbull* (1797) 4 T. R. 448.

*Churchman v Joint Shop Stewards Committee of the Workers of the Port of London*  
[1972] 1 WLR 1094.

*Forster v Brunetti* (1696) 1 Salk 83.

*Hadkinson v Hadkinson* [1952] 2 ALL ER 567.

*Harmsworth v Harmsworth* [1980] 3 ALL ER 816.

*Johnson v Walton* [1990] 1 FLR 350.

*M v Home Office* [1994] 1 A.C. 377.

*McIlraith v Grady* [1968] 1 K.B 468.

*Morris & Others v Crown Office* [1970] 2 K.B 114.

*R v Hargreaves Ex parte Dill* [1954] Crim L. R 54.

*Re B (Infant)* [1965] Ch. 112.

*Re Bramblevale Ltd* [1970] Ch. 128.

*Re Johnson* [1887] 20 Q.B.D. 72.

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*Rex v Almon* 1765, Wilmots Notes, 243.

*Rex v Davis* [906] 1 K.B. 40.

*Webster v Southward London Borough Council* [1983] K.B 698.

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*Taylor v AG* [1975] 2 NZLR 675.

### **Canadian Cases**

*Canadian Metal Company Ltd v Canadian Broadcasting Corporation* (No. 2) [1975] 48  
DLR (3<sup>rd</sup>) 641.

*Johnson v Grant* [1923] SC 789.

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Civil Procedure Act, Chapter 21 Laws of Kenya.

Civil Procedure Rules, 2010.

Constitution of Kenya, 2010.

Contempt of Court Bill, 2013.

Judicature Act, Chapter 8 of the Laws of Kenya.

National Assembly and Presidential Elections Act, Chapter 7, Laws of Kenya (repealed).

Supreme Court Act, No. 7 of 2012.

### **United Kingdom Statutes**

Civil Procedure Act (Amendment No. 2) 2012.

Contempt of Court Act 1981.

Rules of the Supreme Court.

### **New Zealand Statutes**

The Crimes Act, 1860.

## **CHAPTER 1: INTRODUCTION**

### **1.0 Background**

After the 2007 General Elections,<sup>1</sup> there followed a spate of violence in this country which, if not contained, would have possibly resulted in the dismantling of the Kenyan State. That violence resulted from the disputed Presidential Election results that were announced by the then Electoral Commission of Kenya.<sup>2</sup> In a democracy, governed by the rule of law, electoral disputes are settled through well laid down legal procedures.<sup>3</sup> Instead of following the procedure laid down in the law then in force, by presenting an Election Petition in the High Court to contest those results, those who disputed the said 2007 Presidential Election results, resorted to public protests on the basis that they did not have confidence in the judiciary.<sup>4</sup> The result was near catastrophic as there was rampant destruction of property and loss of life in various parts of the country due to breakdown in law and order. The anarchy that was witnessed nearly destroyed the very existence of Kenya as a State.

A strong judiciary is the bedrock of the rule of law and administration of justice. It is when a public has confidence in an effective judiciary, that disputes can be lodged with it for adjudication. When there is no confidence in the judicial system, disputants ordinarily resort to self-help measures resulting in anarchy. The anarchy witnessed in this

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<sup>1</sup> The elections were held on 27<sup>th</sup> December, 2007.

<sup>2</sup> The Electoral Commission of Kenya was later disbanded and replaced with the Independent Electoral and Boundaries Commission of Kenya.

<sup>3</sup> Under the National Assembly and Presidential Elections Act, Chapter 7 Laws of Kenya, (now repealed), any person contesting an election result, be it Presidential or Parliamentary, was entitled to present an Election Petition in before the High Court within 28 days of the declaration of the result.

<sup>4</sup> The complaints ranged from lack of independence, corruption and the unreliability of the Judiciary, as an institution, to impartially adjudicate the dispute. The disputants argued that the Judiciary did not have the capacity or was not well placed to impartially and effectively adjudicate over the Election dispute. In short, there was breakdown of the rule of law.

country in the months of January/February, 2008, was as a result of loss of confidence in the institution of the judiciary and the courts of this country. That confidence had been systematically eroded over the years culminating in that near catastrophic moment.

One of the most important aspects for maintaining confidence in a judiciary, is the ability of that institution to uphold its authority thereby upholding the rule of law and administration of justice. There are various ways of maintaining judicial authority. One of them, which has been successfully applied over the years in many jurisdictions, is the application of the Law of Contempt of Court.<sup>5</sup> The law of contempt of court is applied not only to uphold the dignity and authority of the court but more so to uphold the very rule of law and administration of justice.

The Black's Law Dictionary defines contempt as: -

Conduct that defies the authority or dignity of a court or legislature. Because such conduct interferes with the administration of justice, it is punishable, usually by fine or imprisonment.<sup>6</sup>

Civil contempt on the other hand is defined therein as: -

The failure to obey a court order that is issued for another party's benefit. A civil contempt proceeding is coercive or remedial in nature.<sup>7</sup>

The object of the law of contempt of court is well captured in *Attorney General v Times*

*Newspapers Ltd*,<sup>8</sup> wherein the court held that:-

In an ordered community, Courts are established for the specific settlement of disputes and for the maintenance of law and order. In the general interest of the community, it is imperative that the authority of the court should not only be imperiled and that resources to them should not be subject to unjustifiable interference. When such interference is suppressed, it is not that those charged with the responsibilities of administering justice are concerned for their own dignity; it is because the very structure of ordered life is at

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<sup>5</sup> John Miller, *Contempt of Court* (2<sup>nd</sup> Edn, Clarendon Press 1989). The writer observes that the law of contempt is of ancient origin traceable to the period before the 12<sup>th</sup> century.

<sup>6</sup> Bryan A. Garner, *Black's Law Dictionary* (9<sup>th</sup> Edn, Thompson Reuters 2009) 361.

<sup>7</sup> *ibid.*

<sup>8</sup> [1974] A.C. 273.

risk if the recognized courts of the land are so flouted and their authority wanes and is supplanted.<sup>9</sup>

Closer home, in *Republic v Tony Gachoka & Anor*,<sup>10</sup> the Kenyan Court of Appeal held that a scurrilous and unjustified attack on the Court is calculated to bring into disrepute and contempt on the administration of justice in Kenya and must be punished. Although the case was concerned with criminal contempt, having arisen from skewed reporting of a civil proceeding, it shows the importance of having to preserve the dignity and authority of courts for the sake of the rule of law and effective administration of justice in a democracy.

For this reason, in contempt of court proceedings, the dispute is not as between the court or the concerned judge and the alleged contemnor. Further, in inflicting punishment for contempt, it is not for the vindication of the particular judge or court but rather the protection of the public.<sup>11</sup> This is because, the public has a stake in the judicial system for the administration of justice<sup>12</sup> as the judiciary administers justice on behalf of the public and for the common good.<sup>13</sup> The public needs the courts the same way it needs Parliament and the Executive. If the public loses faith or confidence in the judiciary or the courts, the likely result is that each person will resort to his own remedy for the redress of what he may conceive to be a wrong done to him. Once each one resorts to personal measures for the vindication of what they consider to be their rights, that would lead to the collapse of the rule of law and the very existence of a State would be in jeopardy. That is where Kenya found itself in January–February, 2008 after the 2007

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<sup>9</sup> *ibid* 302.

<sup>10</sup> Crim. Appl. No. NAI 4 of 1999 (UR).

<sup>11</sup> *African Management Communication International Limited v Joseph Mathenge Thuo & Anor* [2013] eKLR.

<sup>12</sup> *CBA v Ndirangu* [1992] KLR 30.

<sup>13</sup> Constitution of Kenya 2010, Article 159.

General Elections because of a weak and unreliable judiciary to which the losers of the election refused to turn to for the adjudication of the dispute.

Enforcement of civil court orders takes the form of committal proceedings for contempt.<sup>14</sup> Presently in Kenya, the law of contempt of court and the procedure thereof is to be found in Section 5 (1) of the Judicature Act<sup>15</sup> and section 63 (c) of the Civil Procedure Act<sup>16</sup> as read with Order 40 Rule 3 of the Civil Procedure Rules. Section 5 (1) of the Judicature Act applies the law as obtaining in England from time to time whilst section 63 (c) of the Civil Procedure Act applies only in cases of disobedience of injunctive orders. The procedure and practice of the law of contempt in England has for long been found in Orders 45 and 52 of the Rules of the Supreme Court England<sup>17</sup> ( hereinafter “the RSC”) . This has however, been replaced by PART 81 of the Civil Procedure (Amendment No. 2) Rules, 2012. Under this regime, there is a requirement that the order be precise; that the order be personally served upon the contemnor; service of statutory notice upon the Crown (Attorney General); leave be sought before commencement of contempt proceedings; the order must be endorsed with a notice of penal consequences and an affidavit of service be filed to prove service of the order.<sup>18</sup> These, amongst other requirements, have in most cases become a hindrance in the enforcement of civil court orders in Kenya.<sup>19</sup> On the other hand however, the procedure under section 63 (c) of the Civil Procedure Act (Order 40 Rule 3 of the Civil Procedure Rules) has no similar requirements save only for service of the order.

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<sup>14</sup> Bowrie Gordon & Lowe Nigel, *Law of Contempt* (4<sup>th</sup> Edn, Butterworths 1983) 123.

<sup>15</sup> Chapter 8 of the Laws of Kenya.

<sup>16</sup> Chapter 21 of the Laws of Kenya.

<sup>17</sup> Scott Richard *et al: The Supreme Court Practice, Vol 1* (Sweet & Maxwell 1998) Orders 45 & 52.

<sup>18</sup> *Victoria Pumps & Anor v Kenya Ports Authority & 4 others* [2002] 1 KLR 709.

<sup>19</sup> *Loice Margaret Waweru v Stephen Njuguna Githuri* CA No. 198 of 1998 (UR).

In Kenya, there have been challenges for litigants who wish to enforce civil court orders through committal proceedings. This has been occasioned by the strict procedural requirements attendant in the English law of civil contempt of court. In *Ochieng Nyamongo & Another v Kenya Posts and Telecommunications Corporation*,<sup>20</sup> an application to commit the officers of the respondent Corporation to civil jail for disobedience of a court order was dismissed on the grounds that there had been no personal service of that order on the officers of that corporation and that the order that was served did not have a notice of penal consequences appended thereon.

Further, the court held that mere knowledge of the terms and directions of the court order and disobedience thereof by the alleged contemnors was not enough to commit the said officers for contempt.

In *Mutitika v Baharini Farm Ltd*,<sup>21</sup> the Court of Appeal of Kenya laid the rule that the standard of proof in contempt of court should be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt. In that case, the court declined to allow an application citing the alleged contemnors for contempt on the ground that the order alleged to have been disobeyed was imprecise in its terms and therefore contempt had not been proved to the required standard.

Courts have grappled with the problem of having to either apply procedures laid under Orders 45 and 52 of the RSC by virtue of section 5 of the Judicature Act or section 63 (c) of the Civil Procedure Act (Order 40 Rule 3 of the Civil Procedure Rules). In *Andalo &*

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<sup>20</sup>[1994] KLR 1.

<sup>21</sup> [1985] KLR 229.

*another v James Gleen Ruseel Ltd*,<sup>22</sup> the applicant applied to commit the respondents to civil jail for contempt of court for having breached an order of injunction. The applicant brought the application under section 63(c) of the Civil Procedure Act. The court held that the applicant should have applied for leave to commence those proceedings under Orders 45 and 52 of the RSC. This was so notwithstanding that section 63(c) of the Civil Procedure Act does not provide for leave before applying for committal.

Further, in *Republic v County Council of Nakuru ex-parte Edward Alera T/a Genesis Reliable Equipment & 2 Others*,<sup>23</sup> the court declined to punish for breach of an injunction on the basis that the practice and procedure obtaining in England had not been followed notwithstanding that the order breached was an injunction and the Applicant had not invoked the jurisdiction of the court under section 5 of the Judicature Act.

The purpose of this research is therefore, to examine the law of contempt of court in the enforcement of civil court orders in Kenya and to propose legal solutions and modification of that law. Although this branch of law is applicable both in criminal and civil proceedings, this research will only confine itself to civil contempt of court.

### **1.1. Statement of the Problem**

There are no clear legal provisions on the law of civil contempt of court in Kenya. In the instances where there has been disobedience of civil court orders, it has emerged that the enforcement mechanisms of the law of civil contempt of court is ineffective. The law of civil contempt of court in Kenya is in a state of confusion thereby making it ineffective in enforcement of civil court orders. The ineffectiveness of the law of civil contempt of

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<sup>22</sup> [1990] KLR 54.

<sup>23</sup> [2011] eKLR.

court has become a real threat to judicial authority, the rule of law and the administration of justice generally.

There has been instances where, applications to enforce civil court orders by way of contempt of court has failed on technicality for reason of unclear position in the legal framework. Further, the insistence on the strict requirements for personal service of the court order, application for leave, notice upon the Attorney General, the endorsement of the order with Notice of Penal Consequences amongst other requirements has undermined the effectiveness of this branch of law. Practitioners get confused as to when and whether to approach the court under section 5 of the Judicature Act or section 63 (c) of the Civil Procedure Act once an order has been breached. This is well illustrated by the following instances: -

In *Ochieng Nyamongo & Another v Kenya Posts and Telecommunications Corporation*,<sup>24</sup> an application to commit the chief officers of the respondent corporation to civil jail for disobedience of a court order failed for the reason that the order had not been served personally upon them. This was notwithstanding that the order had been served upon the corporation itself. In *Andalo & Another v James Gleen Ruseel Ltd*,<sup>25</sup> the respondents breached an order of injunction. The applicant brought an application to enforce compliance through contempt of court proceedings under section 63(c) of the Civil Procedure Act. The application failed on the ground that leave had not been sought in terms of Orders 45 and 52 of the RSC. This was so despite that the order disobeyed was

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<sup>24</sup> *Ochieng Nyamongo & Another v Kenya Posts and Telecommunications Corporation* (n 20).

<sup>25</sup> *Andalo & another v James Gleen Ruseel Ltd* (n 22).

an injunction and the applicant had not invoked the court's jurisdiction under section 5 of the Judicature Act that invokes the English practice and procedure.

The courts have also dismissed contempt of court proceedings on the grounds that leave has not been sought<sup>26</sup> or the Attorney General has not been served with notice of institution of the application for leave<sup>27</sup> or leave is not required at all.<sup>28</sup>

That then, is the unsatisfactory state of the law of civil contempt of court in Kenya which this research seeks to unravel and suggest legal reforms.

## **1.2 Theoretical and Conceptual Framework**

### ***1.2.1 Theories***

This work could be based on the theories of Public Interest and Justice. Public interest is defined as general welfare of the public that warrants recognition and protection;<sup>29</sup> something in which the public as a whole has a stake. Public interest has therefore been taken to be that which is for the well-being of the general public or community.<sup>30</sup> However, this theory has not been used to underpin this work because of time constraint in reaching out to the general public or litigants for their views in the subject under consideration.

However, the theory that has been chosen to underpin this work is the theory of justice. Justice has been defined<sup>31</sup> as fair and proper administration of laws. Various definitions

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<sup>26</sup> *Republic v County Council of Nakuru ex-parte Edward Alera T/a Genesis Reliable Equipment & 2 Others* (n 23).

<sup>27</sup> *John Mugo Gachuki v New Nyamakima Company* [2012] eKLR.

<sup>28</sup> *Christine Wangari Gachege v Elizabeth Wanjiru Evans and 11 others* [2014] eKLR.

<sup>29</sup> Garner (n 6) 1350.

<sup>30</sup> *ibid*

<sup>31</sup> Garner (n 6) 942.

of the term justice have been proffered by many authors. Brian Bix<sup>32</sup> states that justice refers to relatively rigid application of rules and standards, where right action sometimes require more nuanced treatment (either equity or mercy).

Aristotle<sup>33</sup> divided justice into two components; corrective justice and distributive justice. According to him, corrective justice involves rectification between two parties where one has taken from the other or has harmed the other. This will most likely occur in the context of tort or contract law. Distributive justice on the other hand involves the appropriate distribution of goods in society.<sup>34</sup> Justice is also frequently used to refer to following rules as laid down.<sup>35</sup>

John Rawls<sup>36</sup> has posited that justice is the structural rules of society within which people who inevitably have different sets of values and goals in life can co-exist, cooperate and, to some extent compete. Justice is also often used to describe the appropriateness of punishment for wrongs committed in society.<sup>37</sup>

This theory of justice is relevant in this study in that courts of law interpret the laws that regulate society. Their pronouncements should be enforced so that there will be peaceful co-existence in society. It is the basis for which actions of individuals in society are to be judged. Since the courts are the ones that decide on the actions of individuals in society vis-a-vis the rules regulating the society, their success depends on how effective their decisions are. This theory therefore underpins the study.

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<sup>32</sup> Brian Bix, *Jurisprudence, Theory and Context* (5<sup>th</sup> Edn, Sweet & Maxwell 2009) 107.

<sup>33</sup> *Ibid.*

<sup>34</sup> *ibid* 107.

<sup>35</sup> *ibid* 108.

<sup>36</sup> *ibid.*

<sup>37</sup> *ibid.*

### ***1.2.2 Concepts***

This study is informed by the concept of the Rule of Law. Rule of law has been defined to mean a legal principle of general application, sanctioned by the recognition of authorities and usually expressed in the form of a maxim or logical proposition.<sup>38</sup> It is sometimes known as the supremacy of the law, in that, it highlights that law must always be observed and respected by all in order to avoid the society degenerating into anarchy.<sup>39</sup> O’Leary J, a Canadian Judge once observed that:-

To allow court orders to be disobeyed would be to tread the road towards 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 confidence in the courts will quickly result in the destruction of our society. (Emphasis supplied)

While dealing with a case of a party who had refused to answer interrogatories in civil proceedings, Chief Justice McKean of the United States stated in 1778:-<sup>40</sup>

Since, however, the question seems to revolve itself into this, whether you shall bend to the law, or the law shall bend to you, it is our duty to determine that the former shall be the case. (Emphasis supplied)

Lord President Clyde of Canada<sup>41</sup> stated in a civil case that contempt of court is an offence that consists in interfering with the administration of the law; in impeding and perverting the course of justice. That it is not the dignity of the court which is offended when contempt of court is committed but the fundamental supremacy of the law which is challenged.

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<sup>38</sup> Bowrie & Nigel (n 14) 1448.

<sup>39</sup> *Canadian Metal Company Ltd v Canadian Broadcasting Corporation* (No. 2) [1975] 48 DLR (3<sup>rd</sup>) 641,669.

<sup>40</sup> Bowrie & Nigel (n 14) 2.

<sup>41</sup> *Johnson v Grant* [1923] SC 789 [790] cited with approval, inter alia, by Lord Edmund-Davis in *A. G. v Leveller Magazine Ltd* [1979] A.C. 440 [459].

In *Morris and Others v Crown Office*,<sup>42</sup> the court observed that of all places where law and order must be maintained, is in the courts. That the course of justice must not be defeated or interfered with. That those who interfere with justice strike at the very foundations of society. Closer home, in *Republic v Tony Gachoka and Another*<sup>43</sup> the Court of Appeal observed that a free society must be based on law as enacted by parliament.

In this regard, the rule of law implies that a legislature constituted by the citizenry makes laws which are generally agreed upon; that those laws apply equally to all and are enforced by the executive constituted by the citizenry and that in the event of any alleged violation, those laws are interpreted by courts that are constituted by the citizens.<sup>44</sup> It also implies that those laws must apply to all, the individual Members of Parliament who make them, the individual members of the Executive who enforce them, the individual members of the Judiciary which interprets that law as well as all the citizenry and all those residing within the state. Rule of law, simply put, is absolute predominance or supremacy of the law of the land over all citizens, no matter how powerful.<sup>45</sup>

It has been argued<sup>46</sup> that for there to be a rule of law, three conditions must exist. Firstly, there has to be transparency where government decisions are to be measured against pre-determined standard, that is, the law. Secondly, there has to be widespread access to justice whereby the court assesses the consistency of the action complained of with the

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<sup>42</sup> [1970] 2 K.B. 114 [122].

<sup>43</sup> Crim. Appl. No. NAI 4 of 1999 (UR).

<sup>44</sup> *ibid* 4.

<sup>45</sup> Obonyo Levi and Nyamboga Erneo, *Journalists and the Rule of Law* (The Kenya Section of the International Commission of Jurists, 2011) 10.

<sup>46</sup>William C Whilford, 'The Rule of law; New Reflections on an old doctrine' (2006) 6 (2) East African Journal of Peace and Human Rights.

law and thirdly, judicial independence. This concept is concerned with the compliance and application of the law. The theory of the rule of law therefore propagates that all actions in society are to be measured against, pre-determined standards, that is, the law. This concept has been preferred in this study because of the acceptance that a society should be ordered by well-defined rules which are predictable. Those rules must be pre-determined and uniformly applicable to all. That it is only in their uniform application and compliance therewith that there can be peaceful co-existence in society.

Further, since the citizens are governed by the same pre-determined rules, it is imperative that those rules be interpreted by independent institutions that are the courts. In this regard, the conduct of affairs by all citizens is to be measured and be consistent with the law in order to avoid anarchy. This concept of the rule of law has been codified in the constitution of Kenya, 2010<sup>47</sup> as one of the national values and principles of governance. The enactment of the constitution of Kenya, 2010 was hastened after the near catastrophic events of the 2007/2008 post-election chaos.<sup>48</sup> This concept of the rule of law is therefore, an important one that underpins this study.

### **1.3 Literature Review**

The rules embodied in the law of civil contempt of court are intended to uphold and ensure the effective administration of justice. There is wide literature regarding the law contempt of court generally.

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<sup>47</sup> The Constitution of Kenya, article 10.

<sup>48</sup> The Pre-amble to the Constitution of Kenya.

Bowrie and Nigel Lowe have argued that contempt of court can be divided into two broad categories, contempt by interference and contempt by disobedience.<sup>49</sup> They argue that the former category comprises acts such as disrupting court proceedings, publications or other acts which risk prejudicing or interfering with legal proceedings or conduct that scandalizes the court. This is categorized as criminal contempt. An example of these are the cases of *David Makali & 3 Others v Republic*<sup>50</sup> and *Republic v Tony Gachoka & Another*<sup>51</sup> which involved skewed reporting of court proceedings by journalists. The second category comprises disobeying court orders and breaking undertakings given to court.<sup>52</sup> This category is characterized as civil contempt. The learned writers argue that the distinction between criminal and civil contempt is important for reason of procedure and consequences. They are of the view that since criminal contempt is an offence of a public nature, the Attorney General prosecutes the same whilst civil contempt are essentially offences of a private nature. They further argue that the essence of the court's jurisdiction in respect of criminal contempt is penal, the aim being to protect the public interest in ensuring that the administration of justice is duly protected. On the other hand, they are of the view that the court's jurisdiction in respect of civil contempt is primarily remedial and the object is to coerce a party to obey the court order.<sup>53</sup>

The writers further argue,<sup>54</sup> that the contempt jurisdiction can be invoked either by formal application or by the court acting on its own motion. They are of the view that there

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<sup>49</sup> Bowrie and Lowe (n 14) 1.

<sup>50</sup> Crim. Appl. No. NAI 4 & 5 of 1994 (consolidated), UR.

<sup>51</sup> Crim. Appl. No. NAI 4 of 1999 (UR).

<sup>52</sup> Bowrie and Lowe (n 14) 655.

<sup>53</sup> *ibid* 655.

<sup>54</sup> *ibid* 476.

should be restriction of the court's power to act on its own motion in all cases of contempt committed outside the court.<sup>55</sup>

The writers' discussion is based on the law of contempt of court in England. They do not discuss the situation in Kenya and how the law is applied here. This is the gap which this research seeks to bridge.

Halsbury's Laws of England generally discuss the law of contempt in England.<sup>56</sup> It classifies the law of contempt into criminal contempt and civil contempt. The writers discuss how personal service of court orders is central to the law of contempt. However, they indicate that where a person has knowledge or notice of the terms of the order, the court may dispense with the strict requirement of personal service.<sup>57</sup> They insist on strict adherence of personal service of orders. They however, do not discuss how the insistence on strict adherence to the requirements under order 52 of the RSC has led to the ineffective application of the law of civil contempt of court in Kenya. This study, therefore, seeks to fill this gap.

David Eady and A. T. H. Smith<sup>58</sup> have extensively discussed the history of the Law of Contempt of Court in England until the enactment of Contempt of Court Act, 1981. The earliest forms of contempt related to those which affected the court business or violence to service of court process.<sup>59</sup> The earliest procedures in initiating contempt of court were by way of writ of attachment which in the 12<sup>th</sup> and 13<sup>th</sup> Century was used to compel appearance in Court. This was followed by a complaint, then the Bill in the Kings

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<sup>55</sup> *ibid* 477.

<sup>56</sup> Halsbury's Laws (4<sup>th</sup> Edn, 1974) Vol 9, Para 2.

<sup>57</sup> *Husson v Husson* [1962] 3 ALL ER cited in n 56, Para 65.

<sup>58</sup> David Eady and A.T. H. Smith, *Arlidge, Eady & Smith on Contempt* (3<sup>rd</sup> Edn, Sweet & Maxwell 2005).

<sup>59</sup> *ibid* 2.

Bench. In the latter case, a complainant lodged a bill in the King's Bench notifying of the contempt and sued for damages for himself and a penalty for the King. This was finally followed by the procedure of indictment which applied to cases of contempt in the presence of the justices and information.<sup>60</sup>

The learned writers explain how contempt proceedings were initiated in the Chancery Division of the High Court of England and the procedural requirements to be met. If the contempt is proved, the contemnor is punished by imprisonment until he purges the contempt. The writers do not however, discuss our own section 63(c) of the Civil Procedure Act, Cap 21 Laws of Kenya which does not set out the procedure to be followed where there is breach of an injunctive order which has caused much confusion in the application of this law in Kenya. This study seeks to clarify this area and bridge the gap.

John Miller has discussed the initiation of contempt proceedings in England and the applicable procedure.<sup>61</sup> He also discusses how the power to punish for contempt of court is exercised by the High Court and the Court of Appeal of England. The work generally deals with the common law in England as amended by the English Contempt of Court Act, 1981. The work however, does not deal with the challenges that face enforcement of civil orders by way of civil contempt of court proceedings in Kenya where the procedure is not clear. This study, therefore, hopes to fill this gap.

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<sup>60</sup> *ibid* 3.

<sup>61</sup> John Miller (n 5).

In their article, *The Law of Contempt in Kenya*,<sup>62</sup> Githu Muigai & Ongoya E. Elisha, have argued that whilst both the procedural and substantive law of contempt of court in Kenya is heavily borrowed from English Law as it was before 1963, the English Law has undergone substantial modification by the enactment of the Contempt of Court Act of 1981 whilst our law in Kenya is still static.<sup>63</sup> The writers argue that, the English Contempt of Court Act of 1981 has improved the common law in the question of protection of journalists and their sources of information. They have further argued that lack of comprehensive Contempt of Court Act continue to complicate contempt proceedings in Kenya and that currently contempt proceedings appear to be instigated and conducted at the whims of individual judges.<sup>64</sup> They propose a restricted approach of court's own motion jurisdiction and that Parliament should enact a comprehensive legislation in the line of the Contempt of Court Act of England 1981 in order to provide for a more effective legal regime.<sup>65</sup> The writers do not discuss the specific areas that need reform to make the application of the law of civil contempt more effective in Kenya. This is the gap this study seeks to bridge.

Gicheru has argued that the power to punish for contempt of court is inherent to the constitution of the court as an adjunct to the judicial function.<sup>66</sup> He argues that 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 case, would be an

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<sup>62</sup>Githu Muigai and Ongoya Elisha, 'The Law of contempt in Kenya' (2005) 1 Law Society of Kenya Journall.

<sup>63</sup> *ibid* 72.

<sup>64</sup> *ibid* 73.

<sup>65</sup> *ibid* 74.

<sup>66</sup> Evan Gicheru, 'Independence of the Judiciary: Accountability and Contempt of Court' (2005) 1 Kenya Law Review 1.

anomaly which could not be permitted to exist in any civilized society.<sup>67</sup> He proposes that in order to uphold the sovereignty of the Kenyan State, section 5 of the Judicature Act should be repealed and replaced by a comprehensive statute on contempt of court. He quite properly proposes that in appropriate cases, when the Attorney General, in cases of criminal contempt or the parties in civil contempt, fail to take action, the courts should be able to initiate contempt proceedings for the protection of the due administration of justice.<sup>68</sup>

Justice Gicheru expresses the view that civil or criminal contempt is a crime *sui generis*, which is prosecuted by summary process. He therefore proposes that the standard of proof should be that applicable to criminal cases, that the contempt be proved beyond reasonable doubt.<sup>69</sup> He also proposes the maintenance of the strict rules of procedure as to personal service and the inclusion of the Notice of Penal Consequences in the order itself. He proposes that instead of the court pursuing the route of contempt of court, the court should make use of the practice of judicial warnings where a judge warns alleged offenders against repeating particular acts after summoning them to explain their conduct.<sup>70</sup> Justice Gicheru however fails to give concrete steps which a court should take once there is disobedience of a civil court order. He also fails to propose what sanctions, if any, that should be meted out once there has been breach of a court order which gap this study seeks to bridge.

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<sup>67</sup> *ibid* 8.

<sup>68</sup> *ibid* 11.

<sup>69</sup> *ibid* 12.

<sup>70</sup> *ibid* 16.

Hugh Evander Willis has examined the evolution of the law of contempt in the American system over the years finally becoming the same as the common law rule.<sup>71</sup> He argues that direct contempt is an insult to the court or resistance to its authority, committed in the courts presence and therefore an interference with due process of litigation.<sup>72</sup> That contempt of this sort may be punished by the same judge without a jury and without truth as a defence. That if offences such as these cannot be punished they cannot be stopped and if they cannot be stopped, litigation will have to stop.<sup>73</sup> He proposes that the courts should restrain themselves and allow contemnors the privilege of a jury, defence of truth (In derogatory comment on proceedings) and that such a trial be before a different judge rather than the one whose order has been breached or before whom proceedings were concluded. This, he argues, should be observed in punishment for civil contempt, if punitive, and in indirect criminal contempt, when there is a case pending but never to punish for contempt when there is no case pending.<sup>74</sup>

The writer however, does not address the law of civil contempt in Kenya or how the principles he addresses are applicable in Kenya. This research recognizes this gap and will seek to fill that gap.

A.T.H Smith has argued that the law of contempt of court is crucial and is needed to uphold the administration of justice.<sup>75</sup> This need is more acute in a democracy, where the power and legitimacy of the judicial branch of government derives from the willingness

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<sup>71</sup> Willis, Hugh Evander, '*Punishment for Contempt of Court*' (1927) 2 (4) Indiana Law Journal 309.

<sup>72</sup> Bowrie and Lowe (n 14) 309.

<sup>73</sup> *ibid* 310.

<sup>74</sup> *ibid* 313.

<sup>75</sup> A.T.H. Smith '*Reforming the New Zealand Law of Contempt of Court*' An Issue/Discussion paper (2011), 61 and 62. [http://www.crownlaw.govt.nz/uploads/contempt\\_of\\_court.pdf](http://www.crownlaw.govt.nz/uploads/contempt_of_court.pdf). accessed on 27<sup>th</sup> November, 2015.

of the people to be subject to the rule of law. In consequence, the public must have faith in the rule of law. The writer has not however discussed the law of contempt as applied in Kenya. This research recognizes this and will seek to fill this gap.

#### **1.4 The Objectives of the Research**

The objectives of this research will be: -

- (1) To assess the extent to which the law of contempt of court has been applied in enforcement of civil court orders in Kenya.
- (2) To assess how the law of contempt has been ineffective in the enforcement of civil court orders in Kenya.
- (3) To suggest appropriate legal reforms to the law of contempt in enforcement of civil court orders in Kenya.

#### **1.5 Hypothesis**

This research will test the following hypothesis: -

1. Due to the unclear legal regime in the law of contempt in Kenya, the enforcement of the civil court orders has been ineffective.
2. Due to the ineffectiveness in the enforcement of civil court orders, judicial authority has been substantially eroded in Kenya.
3. Since the law of contempt of court in Kenya has been ineffective in enforcement of civil court orders, there is need for reform.

#### **1.6 Research Questions**

This research will look at the following questions: -

1. What is the current status of the law of contempt of court in enforcement of civil court orders in Kenya?
2. What defect is there in the legal regime of the law of contempt of court in civil disputes in Kenya?
3. What legal reforms are required in the law of civil contempt of court in Kenya?

### **1.7 Methodology**

The research is both qualitative and quantitative. Primary sources of data were examined which included the constitution of Kenya, 2010, Statutes and the Contempt of Court Bill, 2013. Decided cases, both reported and unreported were also examined.

As regards secondary sources, the author examined academic materials such as books and articles. The Milimani Law Courts Library, Supreme Court of Kenya Library and the University of Nairobi Law library provided most of the materials for the collection of primary data. The study applied purposive or target respondent sampling technique.<sup>76</sup> The power of this method lies in selecting information that is rich for in-depth analysis related to the central issues being studied. This technique was preferred because the information sought for the study is only available with certain category of persons. Other techniques such as snowballing or random sampling would have led to collection of irrelevant and data which may not have any use for the research. In this regard, specific respondents who possess the desired information would add value to the research.

Since the information desired or required is enforcement of Civil Court Orders, the targeted respondents were two; the judges of the superior courts in Kenya based at

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<sup>76</sup> Donald Kisilu Kombo and Delno L. A. Tromp, *Proposal and Thesis Writing* (Pauline's Publications Africa 2006).

Nairobi and the advocates practicing in Nairobi. The basis for choosing these two categories of respondents was informed by their having first hand personal experience in this branch of law. Judges issue civil orders and entertain applications for enforcement of those orders under section 5 of the Judicature Act as well as section 63(c) of the Civil Procedure Act. On the other hand, practicing advocates represent litigants who obtain orders which, on being disobeyed attempt to enforce them. Due to time limitation, it was not possible to interview persons who are not involved in the administration of justice. This is however admitted to be a limitation of this work.

On interview technique, a questionnaire was used. The advantage of this technique is that the responses that were obtained would be standardized. These were self-administered and saved on time and availability of the interviewees. There were challenges as in most cases, judges would be busy either hearing cases or writing their decisions. They had to respond to the questionnaire during their own free time. Likewise, advocates were also busy and this technique enabled the writer to reach a larger number.

There was limitation in that not all targeted respondents responded. Further, the data was collected only from within Nairobi and does not include other areas in Kenya where the High Court is established or from other people apart from advocates and judges.

## **1.8 Chapter Breakdown**

### **1.8.1 Chapter 1—Introduction**

This chapter introduces the study by setting out the background to the problem. It discusses the research problem, the theoretical and conceptual framework. It reviews the

existing literature on the research topic and sets out the objectives and the hypothesis to be tested. The chapter concludes with the research methodology and chapter breakdown.

### **1.8:2 Chapter 2–Origins and Development of the Law of Contempt of Court**

This chapter contains the meaning and characteristics of the law of contempt. It examines the origin and development of the law of civil contempt of court and how it has been applied in other jurisdictions, in particular the United Kingdom where our law is borrowed from. It concludes with the latest amendments to the law of civil contempt of court in England.

### **1.8:3 Chapter 3–The Law of Civil Contempt of Court in Kenya: Substance, Practice and Procedure.**

This chapter examines how the law of contempt has been applied in civil matters in Kenya. It examines section 5 of the Judicature Act, and various cases decided under that section in light of Order 52 of the RSC (and now PART 81 of the Civil Procedure [amendment No. 2] Rules 2012) of England. It also examines section 63(c) of the Civil Procedure Act as read with Order 40 Rule 3 of the Civil Procedure Rules and the jurisprudence arising therefrom. It highlights the shortcomings in the legal regime caused by the confusing procedural requirements under the English Law as applied in Kenya.

### **1.8:4 Chapter 4–The Contempt of Court Bill, 2013**

This Chapter examines in detail the provisions of the Contempt of Court Bill, 2013. It examines juridical basis for the Bill, the jurisdiction of courts to punish for contempt of court and the limitations or shortcomings of the Bill.

### **1.8:5 Chapter 5 - Summary of Findings, Conclusions and Recommendations**

This chapter contains the findings of the research. It gives the conclusions and the recommendations for the reform in the law of contempt of court in Kenya in civil disputes.

## **CHAPTER 2: ORIGINS AND DEVELOPMENT OF THE LAW OF CONTEMPT OF COURT**

### **2.0 Introduction**

In Chapter 1, we introduced the background to the problem of this study. We set out the statement of the problem, the theoretical and conceptual framework and we reviewed the existing literature on the topic under consideration. We also set out the objectives, hypothesis and the research questions as well as the methodology undertaken in this research.

The present chapter discusses the background and history of the law of civil contempt of court by tracing its origins and development in England. It then discusses the practice and procedure of this law in England and critiques the recent amendments to the law of civil contempt of court in the said jurisdiction. The basis for the English jurisdiction as case study is because it is in England that the law of civil contempt of court became fully developed over the years. This was later wholly applied to Kenya by virtue of section 5 of the Judicature Act. This lays a basis for our study on the civil contempt of court in Kenya.

### **2.1 The Origins and Nature of the Doctrine of Contempt of Court in England**

The law of contempt has ancient origins and has evolved over time through various phases of the English monarchical legal system. Essentially, the law of contempt has its origin in English law.<sup>77</sup> The primary function of the early Monarch was protection of his subjects and consequently administration of justice. It was therefore of utmost importance that his position should be beyond question. In its origin, all legal contempt will be found

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<sup>77</sup> Bowrie and Lowe (n 14) 1.

to consist in an offence more or less against the sovereign himself as the fountainhead of law and justice, or against his palace, where justice is administered. As society evolved, the authority of the king came to be vested in the office of the judge who performed the king's functions as per the delegated mandate. It, therefore followed that, if the authority of the king is beyond question so should be the authority of the judge who is a direct representative of the king.<sup>78</sup> Hence, it is clear that the law of contempt of court has ancient roots and has evolved through the ages.<sup>79</sup>

While tracing the history and nature of contempt of court, John Fox<sup>80</sup> posits that in early history, the idea of '*contempt of the king*' was to be found in the Anglo-Saxon 'Oferhynes'.<sup>81</sup> He argues<sup>82</sup> that the power of courts to punish for contempt can be traced to the undelivered judgment of Wilmot J In *Rex v Almon*<sup>83</sup> written in 1765. In that case, an order was obtained for the defendant to show cause, for publishing a libel on the then Chief Justice of England, Lord Mansfield. The libel was contained in a document wherein the Chief Justice was accused of officiously, arbitrarily and illegally making an order to amend an information against one John Wilkes and also an intention to defeat the Habeas Corpus Act by introducing a rule requiring an Affidavit before issuing a writ of habeas corpus instead of granting it as of course.<sup>84</sup> The show cause proceedings were defended on the grounds that the proceedings should have been in the normal cause by

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<sup>78</sup> *Catmer v Knatchbull* [1797] 4 T. R. 448.

<sup>79</sup> Bowrie and Lowe (n 14) 1.

<sup>80</sup> John C. Fox, 'The Nature of Contempt of Court' (1921) 37 LQR 191 [193].

<sup>81</sup> *ibid* 193.

<sup>82</sup> John C. Fox, '*The King v Almon*' (1886) 24 LQR 184 [185].

<sup>83</sup> *Ibid* 184.

<sup>84</sup> Fox (n 85).

way of information and indictment whereby the defendant would be tried by a jury rather than summarily by attachment.

In his judgment, though not delivered but published after his death,<sup>85</sup> Wilmot J held: -

The power which the courts in Westminster hall have of vindicating their own authority is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it (1 vent. 1) and the issuing of attachments by the Supreme Courts of Justice in Westminster Hall for contempt out of Court stands upon the same immemorial usage as supports the whole fabric of the Common Law..... Indeed, it is admitted that attachments are very properly granted for resistance of process or a contumelious treatment of it or any violence or abuse of the ministers or others employed to execute it. But it is said that the course of justice in those cases is obstructed and the obstruction must be instantly removed; that there is no such necessity. In libels upon courts or judges which may wait for the ordinary method of prosecution without any inconvenience whatsoever. But when the nature of the offence of libeling judges for what they do in their judicial capacities, either in court or out of court, comes to be considered, it does in my opinion become more proper for an attachment than any other cause whatsoever.<sup>86</sup> (Emphasis supplied)

This decision was thereafter referred to with approval in various decisions and became the basis for courts to punish for civil contempt of court.<sup>87</sup> The obedience to the Kings writ which was enforced by attachment from time immemorial as a remedy was extended to enforce the rule of the court.<sup>88</sup> The contempt committed on the face of the court was considered to be criminal while that which was committed outside court was considered to be procedural and therefore of a civil nature.

On attachment, Fox argues<sup>89</sup> that the courts issued this process for bringing any person before them who should be found to have broken the Kings peace or who should appear disposed to break it. The writ of attachment was a prerogative of the king to preserve the peace and enforce obedience to all orders of that high tribunal. It was resorted to because

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<sup>85</sup> *ibid* 184.

<sup>86</sup> *ibid* 185-186.

<sup>87</sup> *Crowfords Case* [1849] 13 K.B. 627, *Re Johnson* [1887] 20 Q.B.D 72, *Rex v Davies* [1906] 1 K.B. 40.

<sup>88</sup> Fox (n 85) wherein *Fox Orster v Brunetti* [1696] 1 Salk 83 is quoted as the 1<sup>st</sup> case where the writ of attachment was applied to enforce an award of arbitration.

<sup>89</sup> *ibid* 194.

disobedience of their orders was contempt of the king himself whose ministers, the judges were. The authority of the Judges being a delegation of that of the King, extended to all parts of the realm whereby the process was issued against all those who broke the peace. It was a prerogative process derived from a presumed contempt of the King's authority.<sup>90</sup> In the same case of the *King v Almon*,<sup>91</sup> Wilmot J is said to have stated that the principle upon which attachments are issued is to facilitate the execution of the law by giving a summary and immediate redress and protection to the persons who undertake it. However, as regards attachment for libels upon courts, the principle underlying attachments was to keep a blaze of glory around the courts and to deter people from attempting to render them contemptible in the eyes of the public.

In essence, Wilmot J was of the view that in the interests of the public for whose benefit the courts exist, the judges should be treated with proper respect as they represented the king and the king represented his people. That the judges were administering justice to the king's subjects on his behalf. The case of *R v Almon*<sup>92</sup> laid down the principle that it is a necessary incident to every court of record founded upon immemorial usage, to fine and imprison upon summary process for contempt committed either in court or out of court.<sup>93</sup>

From 1250 onwards, contempt of court related to disturbance or hostile reaction in or near court thereby affecting its business, or to some violent or insulting reaction to

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<sup>90</sup> *ibid* 195.

<sup>91</sup> *ibid* 197.

<sup>92</sup> *Ibid*.

<sup>93</sup> John Charles Fox, 'The Summary Process to Punish Contempt' (1909) 25 LQR 233.

service of the court process.<sup>94</sup> The relevant act did not necessarily have to be committed in the presence of the court.<sup>95</sup> The early procedures for punishing for contempt varied. In the 12<sup>th</sup> and 13<sup>th</sup> centuries, the writ of attachment was used to compel appearance before court.<sup>96</sup> Upon a verdict of guilty, the judgment was that the defendant be taken to satisfy the king for his fine and upon finding recognizance for the payment he was discharged.<sup>97</sup> There was also the process of lodging a complaint before the King's Bench.<sup>98</sup> Later in the 17<sup>th</sup> century, a formal process of lodging a bill in the King's Bench<sup>99</sup> was developed whereby the complainant would inform the court by way of a bill about the alleged contempt. These were later replaced with indictment and information in the 18<sup>th</sup> century.<sup>100</sup>

John C Fox<sup>101</sup> observes that in the 14<sup>th</sup> Century and onwards up to the early 18<sup>th</sup> Century, the jurisdiction of the English Judges to punish contempt summarily was limited to offences committed in court in the actual view of the judge and to breaches of duty by officers of court. That in the latter part of the 18<sup>th</sup> Century, the summary jurisdiction extended to all contempts whether committed in or out of court.

Originally, contempt which were generally of a criminal nature were tried in a summary manner i.e. without use of a jury, in the Star Chamber. However, after the abolition of the

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<sup>94</sup> David Eady and A. T. H. Smith, *Arlidge, Eady & Smith on Contempt* (3<sup>rd</sup> Edn, Sweet & Maxwell 2005) 1.

<sup>95</sup> *ibid* 2.

<sup>96</sup> *ibid* 3.

<sup>97</sup> Fox (n 96) 196.

<sup>98</sup> Eady & Smith (n 96) 4.

<sup>99</sup> *ibid*.

<sup>100</sup> *ibid* 13.

<sup>101</sup> Fox (n 96) 354.

Star Chamber in 1629, that jurisdiction was assumed by the Kings Bench.<sup>102</sup> However, the civil contempt of court was developed in the Court of Chancery. Whilst the Common Law Courts in general offered litigants the remedy of damages with distress as the ultimate sanction, the Court of Chancery was ready to compel obedience to its orders and decrees and its general process by imprisonment.<sup>103</sup> Those who disobeyed its processes were brought before court by a writ of attachment and were regarded as contemnors.<sup>104</sup>

The procedure was that in case of disobedience to order or decrees of the court, on affidavit evidence, attachment would issue against the alleged contemnor. He was then examined on interrogatories and witnesses examined. If he confessed, or the contempt was proved, the contemnor was committed to prison until he obeyed the order of the court.<sup>105</sup> Unlike in criminal contempt, in civil contempt the usual practice was to interrogate before committal.<sup>106</sup> It was however, not until the 19<sup>th</sup> Century that there was an attempt to distinguish clearly between criminal and civil contempt.<sup>107</sup>

It is on the basis of the foregoing that it can safely be concluded that contempt of court is a broad common law doctrine.<sup>108</sup>

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<sup>102</sup> *ibid* 362.

<sup>103</sup> Eady & Smith (n 96) 15.

<sup>104</sup> Holdsworth, *A history of the English Law* (7<sup>th</sup> Edn, Sweet & Maxwell 1956) 458

<sup>105</sup> Eady and Smith (n 96) 16.

<sup>106</sup> *ibid* 16.

<sup>107</sup> *ibid* 16.

<sup>108</sup> 'Background paper on freedom of Expression and Contempt of Court for the international seminar on promoting freedom of expression with the three specialized international mandates' <[Background paper on freedom of Expression and Contempt of Court for the international seminar on promoting freedom of expression with the three specialized international mandates](#)> accessed 27 November 2015.

## 2.2 The Basis for the Law of Civil Contempt of Court.

The term contempt of court is generally defined as conduct that defies the authority of the court or legislature.<sup>109</sup> Civil contempt of court on the other hand has been defined as the failure to obey a court order that is issued for another party's benefit.<sup>110</sup> It has also been defined as conduct which consists of disobedience to the judgments, orders or other court process and involves private injury.<sup>111</sup>

Civil contempt of court can therefore be said to be an act or omission that is calculated to interfere with the administration of justice or acts that defy the authority of the court, or conduct that tend to bring the authority of the administration of law into disrespect or disregard. This position was well summed up by Lord Diplock<sup>112</sup> when he held that for citizens to live together in peaceful association with one another, it was necessary for the provision of a system for the administration of justice by courts of law and the maintenance of public confidence in such a system. That contempt of court is a term that denotes a conduct that relates to proceedings in a court of law which tend to undermine that system of administration of justice or to inhibit citizens from availing themselves that system for the settlement of their disputes.

Contempt of court has also been defined as a body of rules, principles, procedures and practices that enable the courts to protect the administration of justice through the use of summary processes.<sup>113</sup> It has therefore been argued that the principal purposes of the law is to preserve an efficient and impartial system of justice, to maintain public confidence

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<sup>109</sup> Garner (n 6) 361.

<sup>110</sup> *ibid* 361.

<sup>111</sup> Halsbury's Laws (4<sup>th</sup> Edn, 2007 Re issue) vol 9, para 402.

<sup>112</sup> *Attorney General v Times Newspapers Ltd* [1974] A 273, 307.

<sup>113</sup> Smith (n 77).

in the administration of justice as administered by the courts, and to guarantee untrammelled access to the courts by potential litigants.<sup>114</sup>

In this regard, courts of law punish for contempt of court not to protect themselves but to uphold the rule of law as contempt of court flouts justice itself<sup>115</sup> and it is meant to protect the administration of justice.<sup>116</sup> It exists to provide the ultimate sanction against a person who refuses to comply with the orders of a properly constituted court.

In England, the power that courts of record enjoy to punish contempt is part of their inherent jurisdiction. The juridical basis of this inherent jurisdiction<sup>117</sup> has been described as being, the authority of the judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner.<sup>118</sup> The contempt jurisdiction is exercised by courts of record and not non-courts of record.<sup>119</sup> Courts of record are superior courts while non-courts of record are subordinate or inferior courts. That jurisdiction when exercised by courts of record extends to upholding the authority of inferior courts and tribunals. It is known as the superintendent jurisdiction meant to stop any mischief intended to interfere with the administration of justice in those courts.<sup>120</sup> In *R v Davies*,<sup>121</sup> Wills J held that contempt of court is an offence that is done to the public by weakening the authority and influence

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<sup>114</sup> *ibid* 8.

<sup>115</sup> *AG v Leveiler Magazine Ltd* [1979] A.C. 440.

<sup>116</sup> *AG v BBC* [1981] A.C. 303.

<sup>117</sup> Oswald, *Contempt* (3<sup>rd</sup> Edn, Butterworth 1910) 11. See also *Taylor v A.G* [1975] 2NZLR 675.

<sup>118</sup> Jacobs, 'The Inherent Jurisdiction of the Court'(1970) 23 Current Legal Problems 23, [28] quoted in (n.14) 465.

<sup>119</sup> *Badry v DPP of Mauritius* (1983) 2 A.C. 29.

<sup>120</sup> *R v Davies* [906] 1 K.B. 32.

<sup>121</sup> *ibid*.

of a tribunal which exists for the public good alone. That it is a conduct that is pre-eminently the proper subject of summary jurisdiction.

Orders made by courts should be obeyed and undertakings formally given to the court should be honoured unless and until they are set aside. It is not an answer to a charge of contempt that the order should not have been made in the first place. The proper course is to apply to have the order or undertaking set aside.<sup>122</sup> The motive for disobedience is irrelevant for the purposes of establishing a case of contempt.<sup>123</sup> Court orders bind everyone against whom they are made and may be subject to sanctions for contempt including a minister of the crown in his official capacity.<sup>124</sup> It is observed that notwithstanding the general obligation to obey court orders, unless they are coercive or injunctive in nature they cannot be enforced by committal or sequestration.<sup>125</sup>

Although contempt may be of a civil nature, it is said to partake of a criminal nature. In this regard, the safeguards that apply to an accused in a criminal trial, largely apply to a contemnor e.g. the standard of proof of the contempt is near that in criminal cases of beyond reasonable doubt; the contemnor must be supplied with the terms of the order or undertaking alleged to have been breached; the breach must be precisely described;<sup>126</sup> the contemnor must be given sufficient information to meet the charge he faces; he must be given ample opportunity to defend himself and that the hearing must be in public.<sup>127</sup> In this regard, although a civil contempt is essentially a wrong done to the person entitled to

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<sup>122</sup>*Hadkinson v Hadkinson* [1952] 2 ALL ER 567, and *Johnson v Walton* [1990] 1 FLR 350 [352].

<sup>123</sup> *R v Poplar Borough Council (No. 2)* [1985] A.C. 97.

<sup>124</sup> *M v Home Office* [1994] 1 A.C. 377.

<sup>125</sup> *Webster v Southward London Borough Council* [1983] K.B. 698.

<sup>126</sup> *Harmsworth v Harmsworth* [1980] 3 ALL ER 816 wherein Nicholls L J stated that the proper test for the notice initiating committal proceedings is whether it gives the alleged contemnor enough information to meet the charge.

<sup>127</sup> *Butler v Butler* [1992] 4 ALL ER 833, 839.

the benefit of the order in issue, it nevertheless involves an obstruction of the fair administration of justice which is of public interest and may accordingly, be punished in the same manner as a criminal contempt.

The purpose of the jurisdiction to punish for contempt of court is said not to be for the protection of judicial dignity but for the prevention of interference with the administration of justice or the maintenance of the court's authority and the effectiveness of its orders.<sup>128</sup>

The basis of this jurisdiction can be properly deduced from the pronouncements of Salmon L. J.<sup>129</sup> and Lord Cross of Chelsea.<sup>130</sup> The said Judges observed that the term '*contempt of court*' is misleading. The term suggests that contempt of court proceedings are designed to buttress the dignity of the judges and to protect them from insult. However, the sole purpose of proceedings for contempt of court is to give courts the power effectively to protect the rights of the public by ensuring that the administration of justice shall not be obstructed or prevented or trammelled upon.<sup>131</sup> Further, that contempt of court is an interference with the administration of justice which is something all citizens should be anxious to safeguard.<sup>132</sup>

It has been observed<sup>133</sup> that from the earliest laws of the Monarchical England right to the 14<sup>th</sup> century, the principles upon which contempt of court was based on for which punishment was inflicted, was to restrain disobedience to the commands of the king and

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<sup>128</sup> Eady and Smith (n 96) 66.

<sup>129</sup> *Morris v Crown Office* [1970] 2 K.B. 114.

<sup>130</sup> *AG v Times Newspapers Ltd* [1974] A.C. 273.

<sup>131</sup> Eady and Smith (n 96) 129.

<sup>132</sup> *Morris v Crown Office* (n132) 322.

<sup>133</sup> Fox (n 82).

his courts as well as other acts which tended to obstruct the course of justice. It is further observed that, whether the contempt consists in disobedience to an order, interrupting proceedings, or libelling a judge, the essential vice of the offence is that it obstructs the due course of justice and that it is necessary that the court should have power to remove the obstruction by punishing the offender.<sup>134</sup> That the enforcement of an order to do or to refrain from doing an act by way of attachment or committal is a way of execution. It is contempt to disobey an order which is sanctioned by imprisonment and since the disobedience also deprives the innocent party of means of enforcing his rights, he is entitled to demand that punishment be imposed to enable him reap the fruits of the order made in his favour.<sup>135</sup>

The law of contempt is therefore one of the ways in which the due processes of the law are supported and furthered. It does play a key role in protecting the administration of justice. It is an important adjunct to the criminal process and provides the final sanction in civil process.<sup>136</sup>

### **2.3 Salient Features of Civil Contempt of Court**

Prior to 2012, the procedure of the English Courts was regulated by the Rules of the Supreme Court. Order 45 Rule 5 of those Rules provided: -

1. Where-

A person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or as the case may be, within the time as extended or abridged under Order 3 Rule 5, or

A person disobeys a judgment or order requiring him to abstain from doing an act, then subject to the provisions of these rules, the judgment or order may be enforced by one or more of the following means; that is to say: -

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<sup>134</sup>*ibid*, 201.

<sup>135</sup> *ibid*.

<sup>136</sup> Bowrie and Lowe (n 14) 7.

with the leave of the court, a writ of sequestration against the property of that person;  
where that person is a body corporate, with the leave of the court, a writ of sequestration against the property of any director or other officer of the body;  
subject to the provisions of the Debtors Act 1869 and 1878, an order of committal against the person or where that person is a body corporate, against any such officer.

This was the basis for committal to jail or sequestration for contempt of court. Committal for contempt of court is a major remedy in civil litigation but because the liberty of a subject is at risk, the procedure must be strictly complied with. Lord Denning MR held in *McIlwraith v Grady*,<sup>137</sup> that the fundamental principle is that no man's liberty is to be taken away unless every requirement of the law has been strictly complied with.

In *Butler v Butler*,<sup>138</sup> Lord Donaldson MR held that no alleged contemnor shall be in any doubt as to the charges which are made against him; he shall be given a proper opportunity of showing cause why he should not be held in contempt of court; if the order of committal is made, the accused should know precisely in what respect he has been found to have offended and is given a written record of those findings and of the sentence passed upon him.

It is for the foregoing reasons that there are strict procedural requirements that must be met in contempt of court proceedings. These requirements are considered in the following paragraphs.

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<sup>137</sup> [1968] 1 Q.B. 468.

<sup>138</sup> *Butler v Butler* [1992] 4 ALL ER 833, 839.

### **2.3.1 Clarity**

It is imperative that the order upon which a party is to be charged with contempt must be as clear as possible as to what such party is required to do or abstain from. The alleged contemnor must be able to know clearly what the subject order requires of him.<sup>139</sup>

### **2.3.2 Service**

It is a general rule that, no order of court requiring a person to do or abstain from doing any act may be enforced unless and until a copy thereof is served personally upon such person.<sup>140</sup> Such an order must be served before the expiry of the time fixed for the doing of the act required to be done.<sup>141</sup> The service must be effected personally upon the concerned person.<sup>142</sup> Such service is necessary so that the person sought to be committed is able to know what conduct would amount to breach.<sup>143</sup> Service however, can be dispensed with if it is shown that the person sought to be served is evading service of it.<sup>144</sup>

### **2.3.3 Penal Notice**

There must be prominently displayed on the front of the order a warning to the person on whom it is to be served that disobedience to the order would be a contempt of court punishable by imprisonment or if it be a body corporate, by sequestration of the assets of

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<sup>139</sup> *ibid.*

<sup>140</sup> Halsbury's Laws (n114) 289.

<sup>141</sup> *Re Launder, Launder v Richards* [1908] 98 L.T. 554.

<sup>142</sup> *Re Seal and Edgelow* [1903] 1 Ch 87.

<sup>143</sup> *Churchman v Joint Shop Stewards Committee of the Workers of the Port of London* [1972] 1 W.L.R. 1094 [1098].

<sup>144</sup> *Eady and Smith* (n 96) 1090.

such corporation.<sup>145</sup> In a body corporate, the penal notice should be directed to the company even where it is sought to be enforced against individual directors.<sup>146</sup>

#### **2.3.4. Leave**

Before an order can be enforced by way of committal, leave to bring such proceedings must first be sought.<sup>147</sup> An application for leave to commence contempt proceedings is first made *ex-parte* to a Divisional Court. It is only after leave has been granted by that court that a party seeking to enforce an order by way of contempt of court proceeding, can he then lodge a substantive motion for committal. The requirement for leave is to enable the court to satisfy itself that there is a basis of commencing committal proceedings and that the same is not sought for purposes of vexing or annoying the respondent. Before leave can be granted, the applicant must serve a notice upon the crown one day before lodging the application for leave.<sup>148</sup>

#### **2.3.5 The Application**

The application is by way of a Notice of Motion. The grounds of the alleged contempt must be set out on the motion.<sup>149</sup> The written evidence together with the application must be served personally upon the alleged contemnor. The applicant is confined to the grounds set out in the application and cannot be allowed to supplement them by reliance on additional matters disclosed in the evidence.<sup>150</sup> This is to safeguard against the likelihood of surprise upon the respondent who is entitled to know in advance of what he

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<sup>145</sup> *Benabo v William Jay & Partners* [1940] 4 ALL ER 196.

<sup>146</sup> Eady and Smith (n 96)1094

<sup>147</sup> Order 52 rule 2 (1), the Rules of the Supreme Court.

<sup>148</sup> *ibid*, Rule 2(3).

<sup>149</sup> *Re B(JA) (an infant)* [1965] Ch. 1112.

<sup>150</sup> Eady and Smith (n 96) Chapter 2.

is accused of.<sup>151</sup> The hearing has to be in open court. If the contempt is proved, then the contemnor is sentenced appropriately either by a fine or is committed to jail.

It must be remembered that while criminal contempt was codified under the English Contempt of Court Act of 1981, the practice and procedure in civil contempt of court remained under the Rules of the Supreme Court of England.

## 2.4 Practice and Procedure

Before the amendment of the law in 2012, the procedure for punishing for civil contempt of court was to be found in Order 52 of the RSC Rule 2 thereof provided that: -

2 (1) No application to Divisional Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made *ex-parte* to a Divisional Court, except in vacation when it may be made to a judge in chambers, and must be supported by a statement setting out the name and description of the applicant, the name and description and address of the person sought to be committed and on the grounds on which his committal is sought, and by an affidavit filed before the application is made verifying the facts relied on.

(3) The applicant must give notice of the application for leave not later than the preceding day to the crown office and must at the same time Lodge in that office copies of the statement and affidavit.

It is a requirement of the law of contempt that all the procedural requirements be strictly followed. This is due to the fact that the liberty of a subject is at risk and the courts power for summary jurisdiction must be guarded against abuse.<sup>152</sup>

Once leave is granted, an applicant must make the substantive application by notice of motion within 4 days of such leave being granted failing of which the leave lapses. The notice of motion accompanied by a copy of the statement, and an affidavit in support of

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<sup>151</sup>*ibid* 1088.

<sup>152</sup> *Butler v Butler* [1992] 4 ALL ER 833.

the application for leave must be served personally upon the person sought to be committed.<sup>153</sup>

At the hearing, unless leave is given, the only grounds which can be relied upon to support the application for committal are those set out in the statement or the Notice of Motion.<sup>154</sup> Upon contempt being proved, the court may punish the contemnor by either committal or by fine. The maximum period of committal is two (2) years.<sup>155</sup> The court however, has power to order earlier discharge or to suspend the execution of the committal order for such period or on such condition as the court may specify.<sup>156</sup>

## **2.6. The Current State of the Law of Civil Contempt in England**

In 2012, England undertook amendments to its Civil Procedure Act whereby the Rules of the Supreme Court concerning contempt were replaced with Part 81. This part now provides for applications and proceedings in relation to contempt of court. The part makes extensive provisions on the area of contempt of civil court. Part 81 makes the procedure for contempt of court proceedings much easier, clear and more certain. It provides for enforcement of judgments and orders by way of committal.<sup>157</sup>

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<sup>153</sup> Bowrie and Lowe (n 14) 619.

<sup>154</sup> Order 52, r 6 (3).

<sup>155</sup> Section 14 (1) of the Contempt of Court Act 1981.

<sup>156</sup> Bowrie and Lowe (n 14) 626–627.

<sup>157</sup> Rule 81.4 (1).

### **2.6.1 Service**

In order to be enforced by committal, a judgment or order is required to be served upon the person upon whom it is directed unless the court dispenses with such service.<sup>158</sup> The service must be personal.<sup>159</sup>

As regards undertakings, it is the court to which an undertaking has been given, that is now required to serve the document recording the undertaking upon the person giving the undertaking.<sup>160</sup> Such service may be by post to the person giving the undertaking or to his solicitor.<sup>161</sup> However, if the court does not effect such service, the person for whose benefit the undertaking is given is required to effect service of the same personally upon the person giving the undertaking.<sup>162</sup>

One major improvement on the rule on service is the provision which allows the court to dispense with service where it is satisfied that the person, against whom the order or judgment is directed at, has had notice of the order or judgment requiring him to do or not to do an act. Such notice may be by his being present in court at the time of the making of the order or judgment; or being notified of the terms of the order either through telephone, email or otherwise.<sup>163</sup> The court may also order an alternative mode or place of service.<sup>164</sup> This is a major departure from the previous practice under the Rules of the Supreme Court on service which were strict on personal service. With this amendment,

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<sup>158</sup> Rule 81.5 (1).

<sup>159</sup> Rule 81.6.

<sup>160</sup> Rule 81.7.

<sup>161</sup> *ibid* sub-rule 1 (c).

<sup>162</sup> *ibid* sub-rule 2.

<sup>163</sup> Rule 81.8 (1).

<sup>164</sup> Sub-rule 2.

contemnors will find it difficult to avoid sanction on the basis of non-personal service of an order.

### ***2.6.2. Penal Notice***

An order or judgment may not be enforced by way of committal unless a notice of penal consequences is prominently displayed on the front of the copy of such order or judgment.<sup>165</sup> Such notice should contain a warning to the person to whom the order or judgment is directed that disobedience would be contempt of court punishable by imprisonment, a fine or sequestration of assets.

However, in an undertaking contained in a judgment or order, there is no requirement for the penal notice being endorsed upon the order.<sup>166</sup> This is based on the notion that the giver of the undertaking is aware that failure to satisfy the undertaking has sanctions. The giver of the undertaking is expected to take seriously his/her undertaking to court.

### ***2.6.3 Leave***

Before commencing contempt of court proceedings, one has to seek permission to do so. An application for permission is to be made by a part 8 claim form accompanied by a detailed statement of the applicant's grounds for bringing the committal application and an affidavit setting out all the facts and exhibiting all documents relied upon.<sup>167</sup> This however applies only to applications under Section 3 of Part 81. It does not apply to judgments and orders.

The claim form and all the documents accompanying the same must be served personally upon the respondent who should file an acknowledgment of service within 14 days of

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<sup>165</sup> Rule 81.9 (1).

<sup>166</sup> Sub-rule 2.

<sup>167</sup> Rule 81.14 (1).

service. The respondent is also entitled to file any evidence he wishes to rely on.<sup>168</sup> The application for permission is to be considered by the court at an oral hearing unless the court considers that a hearing is not appropriate.<sup>169</sup> The respondent may appear at the permission hearing if he so wishes upon giving 7 days' notice of such intention.<sup>170</sup>

This is a departure from the previous procedure where the application for leave was heard or considered ex parte. There is also no requirement to serve the crown before lodging the application for leave as was formerly the case. By doing away with ex parte applications for leave and insisting on inter partes, the likelihood of those undeserving committal proceedings ending up in court is greatly diminished thereby saving precious judicial time.

#### ***2.6.4 The Application***

The application for committal is made by way of Application Notice under Part 23 in the proceeding in which the judgment or order or undertaking was given.<sup>171</sup> The application notice must set out the grounds on which the committal application is made identifying separately each alleged act of contempt including, if known, the date of each of the alleged act. The application must be supported by an affidavit or affidavits containing all the evidence to be relied on.<sup>172</sup>

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<sup>168</sup> Sub-rules 2 & 3.

<sup>169</sup> Sub-rule 4.

<sup>170</sup> Sub-rule 5.

<sup>171</sup> Rule 81.10 (1).

<sup>172</sup> Sub-rule 2.

The application notice and the evidence in support must be served personally upon the respondent although the court has discretion to dispense with such service or mode of service.<sup>173</sup>

### ***2.6.5 The Hearing***

Rule 81.28 makes detailed provisions on how the application for committal or sequestration is to be heard. At the hearing, an applicant cannot rely on any other ground save for those grounds set out in the claim form or application notice or statement under Rule 81.14 (1) (a).<sup>174</sup>

The respondent is permitted to give oral evidence at the hearing whether or not he has filed or served written evidence and may be cross-examined. He may also call witnesses to give oral evidence with the permission of court.<sup>175</sup> The Court has the power to require or permit any person other than the respondent to give oral evidence at the hearing. If any witness has given evidence, the court may require his attendance for cross-examination.<sup>176</sup>

All these are a departure from the previous practice where committal proceedings were determined through Affidavit evidence only. The likelihood of an innocent respondent or alleged contemnor ending up in jail is considerably diminished as there is wider latitude for one to defend himself. Further, the likelihood of the court being misled as to the innocence of a contemnor through untested affidavit evidence is diminished.

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<sup>173</sup> Sub-rules 4 & 5.

<sup>174</sup> Rule 81.28 (1).

<sup>175</sup> Sub-rule 2.

<sup>176</sup> Sub-rules 3 & 4.

## **2.7 Conclusion**

In this Chapter, we have discussed the historical origin and context of civil contempt of court. We also discussed how civil contempt of court has been applied and enforced in England for best practices. The features of that doctrine and how it has been applied in those jurisdictions have been revisited. It was noted how strictly the procedural requirements for committal were formerly enforced. Those procedures were hitherto very strict but with the amendment of the law and the introduction of Part 81 of the Civil Procedure Act of England in 2012, the procedure for committal has been made less cumbersome. That amendment led to the enactment of a detailed procedure for committal which has made the law of civil contempt of court in England more certain, clear and easier to apply.

## CHAPTER 3: THE LAW OF CIVIL CONTEMPT OF COURT IN KENYA

### 3.0 Introduction

In Chapter 2, we discussed the origins and development of the law of contempt of court in England. We considered how that law has been applied in civil matters in that jurisdiction with a view to identifying the best practices from where Kenya can borrow. We discussed the basis for the doctrine and how civil contempt proceedings are prosecuted in that jurisdiction. We concluded by considering the recent amendments in the law of civil contempt of court in England.

This chapter examines the juridical basis for the law of civil contempt of court and the jurisdictional basis to punish for contempt in Kenya. We examine the jurisprudence emerging from the Kenyan courts both prior to and after 2012 in this area of the law. We consider how the Kenyan courts have dealt with the various procedural requirements for contempt proceedings including the requirements for; obtaining leave, giving notice to the Attorney General, personal service, the notice of penal consequences and the standard of proof.

We shall also examine how our courts seem inconsistent in the application of the procedural prerequisites for the citing of contemnors. An example is the requirement for leave. In some cases, the courts have insisted that leave is required before contempt proceedings are lodged even where the application is made under Order 40 Rule 3 which clearly does not provide for such leave. In other cases, the courts have held that leave is only required if the contempt jurisdiction is invoked vide section 5 of the Judicature Act. A good example is in the cases of *Tricon International Ltd v Giro Commercial Bank*

*Ltd*<sup>177</sup> and *Africa Management Communication International Ltd v Joseph Mathenge Mugo*,<sup>178</sup> where the High Court applied the position taken by the Court of Appeal in *Joseph Schilling Bingo (K) Ltd v Star Dust Investments Ltd*<sup>179</sup> to the effect that, there is no requirement under Order 40 Rule 3 of the Civil Procedure Rules and section 63 (c) of the Civil Procedure Act<sup>180</sup> for a party to obtain leave before commencing contempt proceedings under that provision of the law. However, there have been other instances where courts have held that since Order 40 Rule 3 does not set out the procedure to punish for contempt, the procedure obtaining in England, where leave is necessary before commencing contempt proceedings, must be adopted notwithstanding that the jurisdiction of the court under section 5<sup>181</sup> has not been invoked.<sup>182</sup>

It is as a result of this confusion that the courts have time and again called for the enactment of Kenya's own comprehensive law of contempt.<sup>183</sup>

### **3.1 Juridical Basis for the Law of Civil Contempt of Court in Kenya**

As discussed in Chapter 2, civil contempt of court is an act or omission that is calculated to interfere with the administration of justice or acts that defy the authority of the court, or conduct that tend to bring the authority of the administration of law into disrespect or disregard. Civil contempt may therefore be defined as a body of rules, principles,

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<sup>177</sup> [2012] eKLR.

<sup>178</sup> [2013] eKLR.

<sup>179</sup> CA No. 134 of 1997 (UR).

<sup>180</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>181</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>182</sup> *Andalo & Another v James Gleen Ruseel Ltd* [1990] KLR 54, See also *Republic v County Council of Nakuru Ex parte Edward Alera T/s Genesis Reliable Equipment & 2 Others* [2011] eKLR.

<sup>183</sup> *Gitobu Imanyara v R* (1990) LWR 11, *Abdalla Dadacha Dima v Arid Lands Resource Exploitation & Development* [2005] eKLR. See also *John Mugo Gachuki v New Nyamakima Co. Ltd* [2012] eKLR.

procedures and practices that enable courts to protect the administration of justice through the use of summary processes.<sup>184</sup>

The contempt of court jurisdiction has been retained by courts over the years as a tool of enforcing the authority of the third arm of government, the Judiciary. In *Johnson v Grant*,<sup>185</sup> it was held that contempt of court is an offence that consists of interference with the administration of the law, the impediment and perversion of the course of justice.

In *Board of Governors, Moi High School Kabarak v Malcolm Bell & Anor*,<sup>186</sup> the Supreme Court of Kenya held that, the power to punish for contempt is given to court to safeguard itself against contemptuous and disruptive intrusion and it is one of the indisputable attributes of the court's inherent power. That it would be virtually impossible for the courts to protect the citizens' rights and freedoms in the absence of this power.

The Court of Appeal of Kenya<sup>187</sup> has also held that the power granted to the court to punish for contempt is meant to guard and protect the authority and dignity of the court orders which power however, when exercised must be balanced with the likelihood of a party losing his or her liberty. That it is essential for the maintenance of the rule of law and good order that the authority and dignity of the courts be upheld at all times. It is for that reason that courts should not condone deliberate disobedience of their orders and should deal with such disobedience swiftly and firmly with proved contemnors.<sup>188</sup>

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<sup>184</sup>Smith (n 77).

<sup>185</sup> Fox (n 40).

<sup>186</sup> S. C. Petition Nos. 6 & 7 of 2013.

<sup>187</sup> *Justus Kariuki Mate & Anor v Martin Nyaga Wambora* [2014] eKLR

<sup>188</sup> *Refrigeration\_and Kitchen Utensils v Gulabchand and Popatlal Shah & Anor*, Civil Appl. No. 39 of 1990 (UR).

The power to punish for contempt is vested in courts in order to safeguard the rule of law which is fundamental in the administration of justice. The courts use this power to ensure that the citizens bend to the law and not vice versa.<sup>189</sup> The exercise of this power has nothing to do with the integrity of the Judiciary or the court or judicial officer concerned.<sup>190</sup> The power to punish for contempt of court therefore is not about the dignity of the court or placating the applicant who moves the court by taking out contempt proceedings, but it is about preserving and safeguarding the rule of law.<sup>191</sup>

A former Chief Justice of Kenya has observed that the power to punish for contempt of court is inherent to the constitution of the court as an adjunct to the judicial function.<sup>192</sup> That it is the undoubted right of a superior court to convict for contempt because a court of justice without power to vindicate its own dignity, to enforce obedience of its mandates, to protect its officers, or to shield those who are entrusted to its care, would be an anomaly which cannot be permitted to exist in a civilized community.<sup>193</sup> He clarified the object of the contempt jurisdiction as not being a vehicle to punish or compensate the judges' injured feelings but is meant to protect the due administration of justice and the maintenance of law and order.<sup>194</sup> It is a power vested in the judges not for their personal protection only, but for the public who have an interest in the due administration of justice.<sup>195</sup>

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<sup>189</sup> *African Management Communication International Ltd v Joseph Mathenge Mugo*, n 181.

<sup>190</sup> *Teachers Service Commission v Kenya National Union of Teachers & 2 others* [2013] eKLR.

<sup>191</sup> *Football Kenya Federation v Kenya Premier League Ltd* [2015] eKLR.

<sup>192</sup> Evan Gicheru, 'Independence of Judiciary: Accountability and Contempt of Court' (2007) 1 Kenya Law Review 1.

<sup>193</sup> *ibid* 8.

<sup>194</sup> *Football Kenya Federation v Kenya Premier League Ltd*, n 194.

<sup>195</sup> *Teachers Service Commission v Kenya National Union of Teachers & 2 Others*, n 193.

The courts in Kenya are alive to the fact that the power to punish for contempt, apart from being self-serving, in that it advances the authority of the courts, it is also a necessary tool in the administration of justice. The same is exercised for the benefit of society on whose behalf judicial authority is exercised.<sup>196</sup>

These principles as developed by the Kenyan courts compare well with how they have been applied by the courts in England and New Zealand. This is because our jurisprudence relies heavily on English law as the source of practice and procedure in this branch of the law.<sup>197</sup>

From the foregoing, it can be concluded that, the power to punish for contempt of court is inherent in the courts themselves not necessarily to retain and protect their own dignity, but also to safeguard the administration of justice and rule of law. Courts are the institutions that have been established constitutionally to administer the law and act as moderators in the settlement of competing interests in society.<sup>198</sup> Accordingly, in order to uphold the judicial authority of the state in settlement of disputes, maintain law and order and prevent the society from degenerating to anarchy, the exercise of that power is necessary in a civilized society.<sup>199</sup>

### **3.2 The Jurisdictional Basis for Civil Contempt of Court in Kenya**

Jurisdiction is the basis for which an exercise of power by a court or tribunal is based. Jurisdiction has been defined to mean everything or the power for which a court of law

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<sup>196</sup> See Article 159 (1) of the Constitution of Kenya.

<sup>197</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>198</sup> Article 159 of the Constitution of Kenya.

<sup>199</sup> *ibid.*

will act.<sup>200</sup> The jurisdiction for courts in Kenya to punish for contempt in civil matters is primarily two fold. These are, under section 5 of the Judicature Act<sup>201</sup> and section 63(c)<sup>202</sup> as read with Order 40 Rule 3 of the Civil Procedure Rules, 2010. Section 5<sup>203</sup> aforesaid provides:-

5(1) The High Court and the Court of Appeal shall have the same power to punish for contempt of court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate courts.

(2) An order of the High Court made by way of punishment for contempt of court shall be appealable as if it were a conviction and the sentence made in the exercise of the ordinary original criminal jurisdiction of the High Court.

This is the general power to punish for contempt of court. It applies to all types of court orders or what can be generally referred to as interference with the due administration of justice. From this provision, it is quite clear that in exercising this jurisdiction, the Kenyan High Court and Court of Appeal have to refer to the law of contempt obtaining in England at the time of the commission of the contempt. In addition, the Supreme Court of Kenya also has jurisdiction to punish for contempt.<sup>204</sup>

The procedure under this jurisdiction was to be found in the Rules of the Supreme Court of England, Order 45 (Enforcement of Judgment and Orders); Order 46 (Writs of Execution) and Order 52 (Committal), respectively. We have already discussed in Chapter 2 the provisions of Order 52, on how contempt proceedings were hitherto undertaken in England before the 2012 amendments.

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<sup>200</sup> *Caltex Oil Kenya Ltd v The Owners of Motor Vessel Lilian "S"* [1989] KLR 1.

<sup>201</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>202</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>203</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>204</sup> Section 28 (4) the Supreme Court of Kenya Act, No. 7 of 2011.

On the other hand, section 63(c)<sup>205</sup> of the Civil Procedure Act provides:-

63. In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed: -

(c) grant a temporary injunction and in case of disobedience commit the person guilty thereof to prison and order that his property be attached and sold.

The procedure for this is set out under Order 40 Rule 3 of the Civil Procedure Rules which provides: -

3(1) In cases of disobedience, or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the court directs his release.

(2) No attachment under this rule shall remain in force for more than one year, at the end of which time, if the disobedience or breach continues, the property attached may be sold, and out of the proceeds the court may award such compensation as it thinks fit, and shall pay the balance, if any, to the party entitled thereto.

The jurisdiction under section 63 (c)<sup>206</sup> is exclusively applicable to orders of injunction.

The section does not differentiate or specify which court is to exercise this power. It is a power therefore that is exercisable by only the high court and the subordinate courts.

This is so because that section and Order 40 Rule 3 simply states that the court issuing the injunction shall have that power. The court is defined under section 2 of the Civil Procedure Act to mean the “*High Court or a subordinate court, acting in the exercise of its civil jurisdiction*”. One thing that is clear from section 63(c) aforesaid<sup>207</sup> as read with Order 40 Rule 3 of the Civil Procedure Rules 2010, is that the detailed requirements found in Order 52 of the RSC are lacking. Despite both sections (63(c) and Order 40 Rule (3) aforesaid being self-sufficient and complete in themselves, courts in Kenya have grappled with the question of whether to import the strict procedures found under Order 52 of the RSC while dealing with applications under Order 40 Rule 3. This will be

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<sup>205</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>206</sup> *ibid.*

<sup>207</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

discussed in the next section where the study considers specific instances where courts were required to exercise their powers under that provision of the law as well as under section 5 of the Judicature Act.

The existence of the dual sources and procedures to punish for contempt of court has presented challenges for the courts in Kenya.

### **3.3. The Kenyan Jurisprudence on Civil Contempt of Court prior to 2012**

Since Kenya attained independence, our courts have had to contend with the challenge of how to apply the law of civil contempt of court in enforcement of court orders and judgments. Due to the uncertainty in our law in this area, the law of civil contempt has been applied with limited success. In the following paragraphs of this section, we outline the challenges faced by the courts in dealing with the various requirements of the contempt proceedings.

#### ***3.3.1 Leave to file Contempt of Court Proceedings***

As was discussed in Chapter 2, Order 52 of the RSC required that before the substantive application for committal is lodged, leave of court must first be sought.<sup>208</sup> This requirement was imported to the Kenyan jurisdiction by section 5 of the Judicature Act.<sup>209</sup>

Due to the express direction in section 5 of the Judicature Act<sup>210</sup> that the practice and procedure in England is the one applicable in punishing for contempt, courts in Kenya have vigorously enforced the requirement that before committal proceedings are

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<sup>208</sup> Order 52 Rule 3(2), Rules of the Supreme Court.

<sup>209</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>210</sup> *ibid.*

commenced, leave of court must first be obtained. This insistence has sometimes been extended even to applications made under section 63 (c) of the Civil Procedure Act,<sup>211</sup> notwithstanding that Order 40 Rule 3 (1) and (2) (formerly Order XXXIX Rule 2 Sub-rules 1 and 2) of the Civil Procedure Rules does not provide or require that leave be obtained.

In *Andalo & Another v James Gleen Ruseel Ltd*,<sup>212</sup> the applicant obtained an *ex-parte* order of injunction which was disobeyed by the defendant before the return date. The applicant therefore took out a motion on notice to cite the defendant for contempt under the former Order XXXIX Rule 2 sub-rule 3 of the Civil Procedure Rules. The High Court held that, since the proceedings were for civil contempt of court, the applicant should have first obtained leave of court under Order 52 Rule 2 of the RSC before filing the application. The application was therefore dismissed.

In *M v S*,<sup>213</sup> an order was made by a subordinate court barring the appellant from taking a child who was the subject of a custody dispute, out of jurisdiction. In disobedience of that order, the appellant took the child to Uganda as a result whereof the respondent took out proceedings in the High Court seeking leave to commence contempt proceedings against the appellant and for the latter's committal. The High Court granted the said leave and ordered that the child be returned to Kenya. On appeal against those orders, the Court of Appeal held that by combining the application for leave and the application for committal in one application, the application was in contravention of the rules of procedure and could not lie. The application was dismissed in its entirety as the court

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<sup>211</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>212</sup> *Andalo & Another v James Gleen Ruseel Ltd* [1990] KLR 54.

<sup>213</sup> [2008] KLR 271.

was of the view that the two prayers, the one for leave and the other for contempt, had to be made under separate applications.

In vigorously enforcing the requirement that leave be obtained before commencing contempt proceedings, courts have declined to entertain contempt proceedings where leave was either obtained irregularly or where there was no strict compliance with the rules of procedure in applying for leave. In *Republic v The Attorney General Ex parte Birdi A. Gadhia*,<sup>214</sup> the court dismissed an application for committal on the basis that leave had been obtained irregularly. The irregularity was that the application for leave was not supported by a statement and a verifying affidavit and had not been served upon the registrar whom the court wrongly equated to the crown office in England. In a later case,<sup>215</sup> the court struck out an application for committal on the ground that leave had been obtained wrongly. In that case, although leave had been obtained, the application for leave was not supported by a statement of facts.

Due to the confusion in the state of the law of civil contempt in Kenya, in most cases parties are unaware how to commence contempt of court proceedings and at what stage to seek leave when the order disobeyed is that of a subordinate court or tribunal. In *John Mugo Gachuki v New Nyamakima Co. Ltd*,<sup>216</sup> an order made by the Business Premises Rent Tribunal was disobeyed by the respondent. Pursuant thereto, the applicant filed suit together with an application in the High Court to compel compliance. Dismissing the application, the court held that those proceedings were incompetent as the applicant should have commenced the proceedings by way of an Originating Notice of Motion

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<sup>214</sup> Kisumu H.C. Misc. Appl. No. 124 of 1990 (UR).

<sup>215</sup> *Jane Nduta Maina v Muthoni wa Monica NRB* HC Misc. Appl. No.324 of 2012 (UR).

<sup>216</sup> [2012] eKLR.

seeking leave to commence contempt proceedings rather than by suit. This was also the case in *M v S*<sup>217</sup> where the Court of Appeal held that, an application for leave to commence contempt proceedings cannot be made within an appeal. In that case, the appellant had appealed against an order of a subordinate court requiring her to return the child to Kenya from Uganda. The respondent sought leave of the High Court within the appeal to commit the appellant for contempt of court. The Court of Appeal held that such an application should have been made separately in a Miscellaneous Application and not within the Appeal.<sup>218</sup> Accordingly, the contemnor could not be committed although she had been in clear contempt of the court order.

In *Republic v County Council of Nakuru ex-parte Edward Alera*,<sup>219</sup> an order was made against the respondent who defied the same by demolishing part of the suit premises. The *ex-parte* applicant sought to cite the respondent for contempt of court. The application was dismissed because the applicant had failed to seek leave of court before commencing the contempt proceedings.

In the above cases, it is clear that although the contemnors were clearly in disobedience of court orders, obedience of those orders could not be enforced by way of committal proceedings for failure by the successful parties to obtain the requisite leave of court.

In both the English jurisdictions, the dichotomy existing in the Kenyan law between an order of injunction and other orders generally does not exist. Whilst under Order 40 Rule 3 there is no requirement for the strict legal procedures for committal, in England all orders including those of injunction have to follow the same strict procedures required for

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<sup>217</sup> *M v S*, n 216.

<sup>218</sup> *ibid* 279.

<sup>219</sup> [2011] eKLR.

committal. The uniformity in English jurisdiction has made the application of the civil contempt of court more certain as opposed to Kenya where the dichotomy has caused much confusion.

### ***3.3.2 Notice upon the Attorney General***

Before 2012, it was a requirement under the English Law that notice of the application for leave to commence contempt proceedings together with the statement and affidavit must be served upon the crown office at least one day before the hearing of the application for leave ex parte. Courts in Kenya have insisted that applications for leave must likewise be served upon the office of the Attorney General. The requirement for service of the leave application on the Crown Office in England was meant to notify that office, which has the prosecutorial powers in England, of the existence of the contempt proceedings. In the normal course, it is that office that was expected to take up those proceedings and prosecute them.<sup>220</sup> The rationale for insistence by the Kenyan courts for that requirement is not very clear. After the constitution of Kenya 2010 came into force in August, 2010, the office of the Attorney General was split and the prosecutorial powers were bestowed upon the office of the Director of Public Prosecutions (“DPP”).<sup>221</sup> That is the office that is now akin to the Crown Office in England.

In *Andalo & Another v James Gleen Ruseel Ltd*,<sup>222</sup> the court dismissed an application to commit a defendant who had disobeyed an injunctive order for contempt on the grounds, inter alia, that the application for leave had not been served upon the Attorney General.

In *Republic v County Council of Nakuru Ex parte Edward Alera t/a Genesis Reliable*

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<sup>220</sup> Smith, (n 77) 133. See also *R v Hargreaves Ex- parte Dill* (1954) Crim L.R 54.

<sup>221</sup> Article 157 of the Constitution of Kenya.

<sup>222</sup> *Andalo & Another v James Gleen Ruseel Ltd*, n 22.

*Equipment & 2 others*,<sup>223</sup> the court held that failure to effect service of the application for leave upon the Attorney General was fatal to the application for contempt and dismissed the same. Further, in *Republic v Attorney General and 5 others ex-parte Peter Nyamu & Anor*,<sup>224</sup> the court dismissed an application for committal on the ground that the applicant had not complied with Rule 2 Sub rule (3) of Order 52 of the RSC of giving notice of the application for leave to the Attorney General at least one day before the application was lodged in court. In *Republic v The Attorney General E-parte Birdi A Gadhia*,<sup>225</sup> the court dismissed an application for committal on the grounds that the same had not been served upon the registrar of the High Court, whom the court had wrongly equated to the English Crown Court.

Whilst the rationale for the service of the leave application upon the Crown Office in England was understandable, the rationale for its insistence by the Kenyan courts is not clear. Many applications for committal, which were otherwise merited, have been struck out because of the insistence of this requirement whereby contemnors have escaped enforcement of court orders by way of committal despite clear disobedience of court orders. It is our view that, in order for this to be avoided so that orders may be enforced through committal seamlessly, it is necessary to amend the Judicature Act and have our own autochthonous procedure through a comprehensive Contempt of Court Act. In such Act, the procedure for committal should be expressly set out so as to provide for notice to the office of the DPP, if necessary.

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<sup>223</sup> *Republic v County Council of Nakuru ex-parte Edward Alera*, n 23.

<sup>224</sup> NRB H.C. Misc C.A No. 405 of 2007 (UR).

<sup>225</sup> Kisumu H.C. Misc. Appl. No. 124 of 1990 (UR).

### 3.3.3 Personal Service

It is a requirement that a party who is in breach of an order of court must be shown to have been made aware of that order before he can be punished for contempt of court. This was a requirement under Order 52 Rule 2 of the RSC. For this reason, courts in Kenya have insisted that for an application for committal to succeed, there must be proof of personal service upon the alleged contemnor of the order alleged to have been breached.

The courts have declined to allow contempt of court proceedings where a party was aware of an order by other means other than by personal service<sup>226</sup> where the officer effecting personal service failed to personally swear the affidavit of service,<sup>227</sup> or where a party authorised an employee to receive process on his behalf.<sup>228</sup>

The insistence by the courts on personal service of the order sought to be complied with cannot be gainsaid. Indeed, Courts have held that mere knowledge of the order does not suffice to punish for contempt. There must be personal service of the same upon the alleged contemnor.<sup>229</sup> As a result, parties who may be aware of court orders but have not been personally served with those orders have continued to ignore such orders and escaped the process of enforcement thereof by way of committal proceedings as demonstrated by the foregoing cases. The insistence by the courts for personal service

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<sup>226</sup> *Augustine Marete Rukunga v Agnes Njeri Ndungire & Anor* [2001] 254. See also *Kariuki & 2 others v Minister of Gender and Sports, Culture and Social Services & 2 Others* [2004] 1 KLR 588.

<sup>227</sup> *Emma Wanjiku Ndung'u v Francis Njoroge Kamau & 4 Others* [2012] eKLR. See also *Margaret Wambogo Nyaga & 2 others v Clerk Embu County Council & Others* [2008] eKLR.

<sup>228</sup> *Simon Kimani v Geoffrey Kimani Gathigi & Anor* [2014] eKLR.

<sup>229</sup> *Nyamongo and Anor v Kenya Posts and Telecommunications Corporation*, n 20 and *Zedekiah Ochino & Another v George Aura Okombo & Others* [1988] KLR.

has made it virtually impossible to enforce civil orders by way of committal proceedings. It has been argued that the insistence on personal service has made it almost impossible to enforce orders especially against public officers who are very difficult to reach.<sup>230</sup>

In England, following the 2012 amendment, personal service of the order is no longer a strict requirement.<sup>231</sup> Personal service may be dispensed with where there is proof of knowledge of the order.<sup>232</sup> This makes enforcement of orders by committal more convenient and easier.

### ***3.3.4 Notice of Penal Consequences***

Courts have held time and again that apart from the alleged contemnor being personally served with the order, such order must have a notice of penal consequences appended on the face of it. The purpose of that notice is to inform the person upon whom the order is served that if he disobeys the order, he will be liable to the process of execution to compel compliance therewith.

In *Akber Abdullah Kassam Ismail v Equip Agencies Ltd & 4 others*,<sup>233</sup> the Court of Appeal held that failure to have the order endorsed with the notice of penal consequences on the face of it is a serious irregularity and fatal to an application for contempt. In that case, the alleged contemnors had been served with an order which did not have a penal notice. The contemnors disobeyed the order but could not be punished for lack of penal

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<sup>230</sup> Peter Gacheru Ng'ang'a, 'Enforcement of court orders against State and Public Officers; Contempt of Court and the Promises of the constitution of Kenya, 2010'. A Thesis submitted for LLM, degree UON 2014.

<sup>231</sup> Part 81 Civil Procedure Act of England.

<sup>232</sup> *ibid*, Rule 81.8(1).

<sup>233</sup> [2014] eKLR.

notice as aforesaid. In *Tricon International Ltd v Giro Commercial Bank*,<sup>234</sup> the court held a Notice of Penal Consequences typed on a different page and not on the face of the order to be improper and as sufficient enough to lead to the dismissal of an application for committal.

The rationale for the notice of penal consequences is that the person served with the order may not know that disobedience thereof would lead to punishment for contempt.<sup>235</sup> In England, the requirement for a notice of penal consequences being appended on the face of the order was still retained after the 2012 amendment.<sup>236</sup> However, such notice is not required in undertakings contained in a judgment or order.<sup>237</sup> It is a position that is worthy emulating in Kenya.

### **3.3.5 Standard of Proof**

Due to the penal consequences that are attendant to contempt proceedings, the standard of proof is ordinarily higher than that required in ordinary civil proceedings.<sup>238</sup> It has been held that the standard of proof in contempt proceedings must be higher than that of proof on a balance of probabilities almost but not exactly beyond reasonable doubt.<sup>239</sup> However, sometimes the courts have insisted that the proof of contempt should be beyond reasonable doubt whereby deserving committal proceedings have been dismissed.

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<sup>234</sup> *Tricon International Ltd v Giro Commercial Bank Ltd*, n 180.

<sup>235</sup> *Margaret Wambogo Nyaga & 2 Others v Clerk of Embu County Council & 2 others* [2008] eKLR .

<sup>236</sup> Part 81 of the English Civil Procedure (Amendment) Rules, Rule 81.9 (1).

<sup>237</sup> *ibid*, Rule 81.9(2).

<sup>238</sup> *Re Bramblevale Ltd* [1970] Ch 128.

<sup>239</sup> *Rex v Almon* 1765, Wilmots Notes, 243. See also the Court of Appeal decision in *Mutitika v Baharini Farm Ltd* [1985] eKLR where it was held that proof beyond reasonable doubt propounded in the *Re Bramblevale Case (ibid)* was too high.

In the cases of *Titus Munyoki Nzioki v John Kimathi Maingi & another*<sup>240</sup> and *John Mbugua Kimari v John Njoroge Kimari*,<sup>241</sup> the courts held that the standard of proof in contempt proceedings should be beyond reasonable doubt and consequently dismissed the contempt proceedings before them for not having been proved beyond reasonable doubt. However, in *Quick Handling Aviation Ltd v Adan Noor Adan*<sup>242</sup> the court held that the standard of proof in contempt proceedings is higher than proof on a balance of probabilities, almost but not exactly beyond reasonable doubt.

In *Hannah Njeri Gichatha v William Kamau Gichatha & Anor*,<sup>243</sup> the court restrained the defendants from constructing houses on or trespassing onto, or working on a suit property or in any other way dealing with the said property. Despite being served with the order, the defendants stopped construction but continued to stay on the subject property. On an application for committal for disobedience of the order, the court held that the order was neither clear nor unambiguous as the plaintiff had failed to show that the continued stay in the suit premises was in breach of the order. That the breach had not been proved to the required standard. This was despite the fact that by remaining on the property, the respondents were trespassing thereon or dealing with the property contrary to the terms of the order.

The standard of proof that the courts in Kenya insist on is equivalent to that obtaining in England.

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<sup>240</sup> [2013] eKLR.

<sup>241</sup> [2014] eKLR.

<sup>242</sup> [2015] eKLR.

<sup>243</sup> [2010] eKLR.

From the foregoing, it may safely be concluded that the courts in Kenya have not been consistent on the standard of proof to be applied in contempt of court proceedings.

### **3.4. The Kenyan Jurisprudence Post 2012**

After the amendment of the law in England, following the implementation of Lord Woolf's Report,<sup>244</sup> the Rules of the Supreme Court of England are gradually being replaced with the Civil Procedure Rules, 1999. In October, 2012, the Civil Procedure (amendment No. 2) Rules 2012 brought in Part 81 which effectively replaced Order 52 of the RSC. With the coming into operation of the said Part 81 in England, and since section 5 of the Judicature Act<sup>245</sup> provides that Courts in Kenya, in exercising the power to punish for contempt, apply the law as is for the time being in England, the Kenyan courts have also taken queue and have begun to shift from the former strict requirements of Order 52 of the RSC.

In *Christine Wangari Gacheke v Elizabeth Wanjiru Evans & 11 Others*<sup>246</sup> the Court of Appeal held that since Rule 81.4, which provides for breach of judgments, orders or undertaking, does not require leave to commence contempt proceedings, leave is no longer a requirement in contempt proceedings for breach of a judgment, order or undertaking. Accordingly, the court dismissed an application that had been lodged before it for leave to commence contempt proceedings.

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<sup>244</sup> Harry Woolf, *Access of Justice Report*, (London, HMSO, 1996).

<sup>245</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>246</sup> [2014] eKLR.

In *Basil Criticos v Attorney General and 8 Others*,<sup>247</sup> the court held that, it is no longer the law that there be personal service of a court order. Knowledge of the order is sufficient and that knowledge supersedes service.<sup>248</sup>

In a more recent decision of *Shimmers Plaza Ltd v National Bank of Kenya Ltd*,<sup>249</sup> the Court of Appeal held that, it is no longer necessary to prove personal service in contempt proceedings for breach of judgment, order or undertaking in terms of Rule 81.4 of the English Civil Procedure (Amendment No. 2) Rules, 2012. Knowledge of the order through other means such as the party or the party's counsel being in court when the order is being made will suffice to punish for contempt where there is a breach.

In a later case of *James H. Gitau Mwaura v Attorney General & Muthoni Kimani*,<sup>250</sup> the court firmly held that the old stiff requirements that a person facing contempt of court proceeding be strictly proved to have been personally served with the order and penal notice is no longer the law both in Kenya and in England. That what the court has to do now is only to satisfy itself that the person before the court for contempt had full knowledge or notice of the existence of the order of the court. The court further held that, service of a judgment or order alleged to have been breached and the penal notice upon the advocate representing the person being charged with the contempt of court is sufficient service unless it can be proved that such advocate did not notify his client.

In the said case, the court found the Deputy Solicitor General of Kenya guilty of contempt of court for failing to pay the applicant an amount awarded to him in a

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<sup>247</sup> [2012] eKLR.

<sup>248</sup> *ibid.*

<sup>249</sup> (2015) eKLR.

<sup>250</sup> [2015] eKLR.

judgment and sentenced her to a fine of Ksh.300,000/- in default to imprisonment for three (3) months.

From the foregoing, it is clear that with time, the courts are now slowly moving away from the former strict requirements of the Rules of the Supreme Court of England where, service of the application for leave had to be served upon the Attorney General, personal service of the order endorsed with a notice of penal consequences as well as leave were the core requirements<sup>251</sup> for contempt of court proceedings.

### **3:5 Practitioner Views**

In undertaking this study, we sought to ascertain how the legal fraternity in Kenya view the application of the law of civil contempt of court in this country. To achieve this, we prepared a questionnaire which we administered on a number of Advocates who practice in Nairobi as well as Judges of the Superior Courts working in Nairobi. We received responses from the Advocates as well as the Judges of the Court of Appeal, the High Court, Employment and Labour Relations as well as the Environment and Land Court. There was no response from the Judges of the Supreme Court.

From the responses, it was clear that the law of civil contempt of court as a way of enforcing civil court orders in Kenya has been partially successful. On a count of 1 to 10, the respondents gave in Kenya it a success rate of six (6). In their view, the success in the application of this law has been hampered by the technicalities involved in bringing contempt proceedings. The procedure attendant to civil contempt proceedings is both cumbersome and unclear. It was felt that the requirements for leave, service of notice

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<sup>251</sup> In *Kenya Tea Growers Association v Francis Atwoli & 5 Others* [2012] eKLR, the High Court cited the Secretary General of COTU, Francis Atwoli for contempt and fined him Ksh.500,000/- when it was demonstrated that he had knowledge of a Court Order which he disobeyed.

upon the Attorney General, personal service of the order with a notice of penal consequences appended thereon were an impediment to a successful application of this law. It was suggested that the said requirements be done away. The view taken was that obedience to court orders should be as a matter of course like it is in obeying any law instead of having stringent measures as a prerequisite to its application. That personal service of the order should only be retained if knowledge of the order is not proved.

Both the practitioners and the Judges were in agreement that the state of the law of civil contempt of court in Kenya is dissatisfactory. That having two separate jurisdictions, one under section 5 of the Judicature Act and another under Order 40 Rule 3 of the Civil Procedure Rules, had contributed to the uncertainty in this law. Further, that having to refer to the law in England for practice and procedure has contributed to the uncertainty and confusion in this law. This is the case because not all practitioners, or even the judges for that matter, keep themselves abreast with the constant changes in the English law in this area.

The respondents felt that there should be a comprehensive home grown statute providing for both the substantive as well as procedural law on civil contempt of court. That a special enforcement force should be established within the judiciary tasked with the obligation of monitoring compliance with court orders and where there is a breach, enforce the same. Most Judges felt that courts should be empowered to move *suo motto* on enforcement of their orders if disobeyed without necessarily having to wait for the successful party to take action. It was suggested that this should be the only exception to the general requirement that the court be a neutral arbiter in proceedings before it. The argument was that, once an order is issued, the court issuing the same should own the

same and feel obligated to ensure compliance therewith. It is only then that the law of civil contempt of court can be effectively applied to ensure that there is rule of law and proper administration of justice.

We agree with the view expressed by the respondents. It is clear that the Kenya courts have been more concerned with the technical aspects of the law of civil contempt of court than its purpose. There is more obsession with technical procedural requirements such as personal service, even where there is admitted knowledge of the order, penal notice being appended on the order whilst every citizen ought to know that disobedience of an order has consequences; service of notice upon the Attorney General whilst that office completely has nothing to do with prosecution of civil contempt of court proceedings. This obsession with procedural technicalities has compromised justice in that many successful litigants have failed to realize the fruits of their litigation for reason of these technicalities.

In our view, the Kenyan courts should have been concerned with the higher goal of maintain the rule of law and administration of justice rather than these technical aspects. Many orders have gone unenforced thereby defeating the very essence of the law of civil contempt of court for reason of these procedural technicalities. This attitude by the courts has aided the contemnors to avoid consequences of their actions to the detriment of the rule of law and administration of justice. The courts, in our view, should be concerned with the substance and spirit of the law rather than its procedural technicalities as has been the case. It is our hope however that with the passage of Article 159(2) of the Constitution of Kenya, the Kenyan courts will no longer sacrifice justice at the altar of technicalities, if only to make this law more effective.

We take the view that it is the apparent weakness or ineffectiveness in the law of civil contempt of court that has emboldened top public officers and politicians to openly disregard court orders.<sup>252</sup>

### **3.6 Conclusion**

In this chapter, we have discussed the juridical basis for the law of civil contempt in Kenya. We established that the Kenyan Courts have held that the basis and rationale of the law of civil contempt of court is both to protect the dignity and authority of the courts in the judicial process as well as to protect the higher public interest of upholding the rule of law and administration of justice.

The chapter also discussed the current state of the law of civil contempt of court in Kenya. It was established that the contempt of court jurisdiction is to be found both under section 63 (c) of the Civil Procedure Act as read with Order 40 Rule 3 of the Civil Procedure Rules, 2010 in respect of orders of injunction and under section 5 of the Judicature Act, respectively. The latter jurisdiction was found to be problematic as it imports the law for the time being in existence in England. Many contempt of court proceedings were found to have been dismissed for failure to adhere to the strict requirements under this procedural jurisdiction which include leave, service of the

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<sup>252</sup> In 2014, Hon. Justin Muturi, Speaker of the National Assembly stated that the Kenyan Parliament will not honour an order that had restrained a committee of the House from summoning some commissioners of the Judicial Service Commission. He termed those orders as ‘*idiotic*’. *The Standard* (3<sup>rd</sup> March, 2014). In the same year, the senate proceeded to impeach Governor Wambora of Embu notwithstanding that there was an order restraining the Senate from debating that motion. *The Daily Nation* (17<sup>th</sup> April, 2014). Most recently, after the Court of Appeal ordered the Teachers Service Commission to pay the Teachers a 50-60% increase ordered by Labour Relations and Employment Court, the President of the Republic of Kenya boldly stated that the government would not implement that order. He was quoted as saying the Government cannot pay won’t pay. *The Standard* (12<sup>th</sup> September, 2015). Despite these blatant disobediences to court orders, no action whatsoever was taken to enforce the disobeyed orders.

application for leave upon the Attorney General and personal service of the order with an appended notice of penal consequences.

Even after the law was amended in England in 2012, with the application of Part 81 of the English Civil Procedure (Amendment No. 2) Rules, 2012, it was established that the Kenyan courts still apply the old law. The continued requirement for personal service of the order with notice of penal consequences appended thereon, in orders that are not for injunction or enforcement of judgment or undertaking and the requirement of a higher standard of proof will continue to hinder the effectiveness of this branch of the law.

It is for these reasons that we find the state of the law of civil contempt of court in Kenya to be unsatisfactory. It is expected that the proposed enactment of our own Civil Contempt of Court Act through the Contempt of Court Bill, 2013 will make committal proceedings in Kenya much easier, clearer and certain.

## **CHAPTER 4: A CRITIQUE OF THE CONTEMPT OF COURT BILL, 2013**

### **4.0 Introduction**

In Chapter 3, we examined the juridical basis for the law of civil contempt of court in Kenya and the jurisprudence emerging from the Kenyan Courts both prior and post 2012. In this regard, we considered how the courts in Kenya have had challenges in dealing with the procedural requirements in contempt proceedings brought about by having to apply the law for the time being applicable in the United Kingdom. We discussed both the substantive and procedural law applicable in England as had been applied in Kenya. We also examined how Kenyan courts had expressed frustration and displeasure with the lack of Kenya's own law of contempt of court and the confusion arising in having two jurisdictions for contempt of court, to wit, section 5 of the Judicature Act and section 63 (c) of the Civil Procedure Act.

In this Chapter, we examine the proposed Contempt of Court Act as contained in the Contempt of Court Bill, 2013 (hereinafter "the 2013 Bill"). We consider to the juridical basis for the 2013 Bill; the definition of civil contempt under the 2013 Bill; the jurisdiction of various courts in dealing with civil contempt of court and the punishment provided therein. The reason for considering these provisions is to examine whether the 2013 Bill, fully addresses the shortcoming and challenges that exist in the law of civil contempt of court as it stands currently.

#### **4.1 The Juridical Basis for the Contempt of Court Bill, 2013**

Since independence the Kenyan courts have continued to apply the law, practice and procedure for the time being applied by the High Court of Justice of England<sup>253</sup> as far as contempt of court is concerned. In chapter 3, we noted how various courts have expressed their dissatisfaction with the current state of the law of civil contempt of court in Kenya and the need for reform.

There has been publication of the Contempt of Court Bill, 2013 to address this problem. From its pre-amble, the Bill seeks to define and limit the powers of courts in punishing for contempt of court. The 2013 Bill provides the objectives of the proposed law to be; to uphold the dignity and authority of the court; to ensure compliance with the directions of the court; to ensure the observance and respect of the due process of law; to preserve an effective and impartial system of justice and to maintain public confidence in the administration of justice as administered by court.<sup>254</sup> The said objectives effectively capture the juridical basis for or the real essence of having the law of contempt of court, that is, the administration of justice and the maintenance of the rule of law as confirmed in Chapter 3 of this study.

#### **4.2 Contempt of Court under the Bill**

The 2013 Bill borrows heavily from the English Contempt of Court Act, 1981. It deals with contempt of court generally. It does not distinguish between criminal and civil contempt of court. However, this study will only limit itself to the extent that the 2013 Bill relates to or provides for civil contempt of court. The 2013 Bill defines what

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<sup>253</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>254</sup> Clause 3 of the Contempt of Court Bill, 2013.

constitutes civil contempt of court, the jurisdiction of the courts to punish for contempt of court and the sanctions therefor.

#### ***4.2.1 Definition of Civil Contempt of Court***

Under the 2013 Bill, civil contempt of court has been defined as wilful disobedience of any judgment, decree, direction, order or other process of court or wilful breach of an undertaking given to a court.<sup>255</sup> This definition is wide enough in that it encompasses any wilful disobedience of a decision made by a court as well as breach of undertaking given to court.

Apart from giving both criminal and civil definitions of contempt of court, the 2013 Bill gives another definition of contempt of court that is neither civil nor criminal.<sup>256</sup> The 2013 Bill provides that any wilful conduct or act that interferes, obstructs or interrupts the due process of the administration of justice in relation to any court or that is meant to lower the authority of court or scandalizes a judge or a judicial officer in relation to any proceeding before a court constitutes contempt of court. These definitions of contempt of court are wide enough to safeguard the objectives of the proposed Act, that is to protect the authority of the courts and preserve the administration of justice and the rule of law.

#### **4.3 Jurisdiction of Courts**

The jurisdiction of the courts to punish for contempt of court is expressly provided for in the 2013 Bill.<sup>257</sup>

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<sup>255</sup> *ibid*, clause 8(1).

<sup>256</sup> *Ibid*, clause 8(3).

<sup>257</sup>*ibid*, clause 4.

#### ***4.3.1. Superior Courts***

The 2013 Bill proposes to give all the Superior Courts power to punish for contempt of court. It defines the Superior Courts as defined in the constitution of Kenya, 2010.<sup>258</sup> These are; the Supreme Court, the Court of Appeal, the High Court, the Land and Environment Court and the Employment and Labour Relations Court. Their power extends to punishing for contempt of court on the face of the court and to upholding the dignity of the subordinate courts. The latter power<sup>259</sup> is exercisable by the superior court in the exercise of its supervisory powers.

In our view, this provision<sup>260</sup> that gives superior courts power is deficient in that it does not give any express power to the superior court to punish for civil contempt of court. We shall consider this aspect later when we discuss the limitations or the flaws in the said bill.

#### ***4.3:2. Subordinate Courts***

The Bill proposes to give power to subordinate courts to punish for contempt of court committed on the face of the court only.<sup>261</sup> It specifies the instances where such power is exercisable as being; where a person assaults, threatens, intimidates, or wilfully insults a judicial officer or a witness, during a sitting or attendance in court or while going to or returning from court in respect of which the proceedings relate;<sup>262</sup> or where a person

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<sup>258</sup> Article 162 (1) of the Constitution of Kenya.

<sup>259</sup> Contempt of Court Bill, 2013, clause 4 (2).

<sup>260</sup> *ibid.*

<sup>261</sup> *ibid.*, clause 5.

<sup>262</sup> *ibid.*, clause 5 (a).

wilfully interrupts or obstructs the proceedings in the court<sup>263</sup> or wilfully disobeys an order or direction of a subordinate court in the cause of the hearing.<sup>264</sup>

The power to punish by subordinate courts as provided for in the 2013 Bill is in addition to punishing for disobedience of an order of injunction issued by such courts.<sup>265</sup> The latter power has been retained in the Bill by virtue of the provision to the effect that the provisions contained in the Bill shall be in addition to and not in derogation of the provision of any other written law relating to contempt of court.<sup>266</sup>

#### **4.4 The Limitations of the Contempt of Court Bill, 2013**

The publication of the 2013 Bill is a step in the right direction. However, the Bill seems to have certain limitations or deficiencies which in our view have the likelihood of undermining the law of civil contempt of court which it seeks to address. We propose to address these limitations in the following sections.

##### ***4.4:1 The Power to Punish for Civil Contempt of Court by Superior Courts***

In the current legislation, the power to punish for civil contempt by superior courts is by way of reference to the power exercised by the High Court and Court of Appeal in England.<sup>267</sup> The other power that is expressly given by legislation is the one in relation to breach of an order of injunction.<sup>268</sup> In the 2013 Bill, there seems to be no power given to

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<sup>263</sup> *ibid*, clause 5(b).

<sup>264</sup> *ibid*, clause 5(c).

<sup>265</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

<sup>266</sup> Contempt of Court Bill, 2013, clause 34.

<sup>267</sup> Section 5 of the Judicature Act, Chapter 8 of the Laws of Kenya.

<sup>268</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya.

the superior courts to punish for civil contempt of court in terms of the definition of civil contempt of court under the Bill.<sup>269</sup>

In order to understand this lacuna, it is imperative to look at what it is provided for in the Bill. Clause 4 of the Bill, which gives jurisdiction to punish for contempt of court generally, provides: -

4. (1) Every superior court shall have power to: -  
punish for contempt of court on the face of the court; and  
punish for contempt of court and uphold the dignity and authority of subordinate courts.

(2) In any other case, other than contempt on the face of a subordinate court, a superior court shall, in the exercise of its supervisory powers under subsection (1) (b) and on application by any person to the court, punish contempt of court.

From the foregoing, it is clear that under the Bill, the superior courts will only have power to punish for the contempt of court as specified in subsections 1 and 2<sup>270</sup> which are three in number. These are; contempt on the face of the court,<sup>271</sup> punish to uphold the dignity and authority of the subordinate court<sup>272</sup> and finally, punish any contempt in the exercise of its supervisory powers over the subordinate courts.<sup>273</sup>

Contempt of court committed on the face of the court is criminal in nature.<sup>274</sup> Such contempt does not matter whether it is committed in the course of a civil or criminal proceeding. Once contempt is committed on the face of the court, it is criminal contempt and is subject to the criminal sanctions in a summary manner.<sup>275</sup>

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<sup>269</sup> Contempt of Court Bill, 2013, clause 8.

<sup>270</sup> *ibid* clause 4.

<sup>271</sup> *ibid*, subclause 1(a).

<sup>272</sup> *ibid*, subclause 1(b).

<sup>273</sup> *ibid*, subclause 2.

<sup>274</sup> Contempt of Court Bill, 2013, clause 8(2).

<sup>275</sup> *ibid* clauses 6 and 25.

Civil contempt of court by its very nature is ordinarily committed outside court. Indeed, it is referred to as contempt committed otherwise than in the presence of the court.<sup>276</sup> This is clearly borne by the definition of what constitutes contempt of court in civil proceedings. This is expressly defined<sup>277</sup> in the Bill as: -

In case of civil proceedings, willful disobedience of any judgment, decree, direction, order, or other process of court or willful breach of an undertaking given to court.....

This definition does not at all fit in the contempt of court for which the superior courts can punish under section 4 of the Bill. In this regard, it will be possible for a party in a civil proceeding to disobey an order, judgment, direction or process of the superior court, be found to be in contempt but raise an objection that the superior court lacks jurisdiction to punish him for such contempt. This is a serious lacunae in the Bill since, in the words of the Court of Appeal in *The Owners of Motor Vessel Lilian 'S' v Caltex Oil Kenya Ltd*,<sup>278</sup> jurisdiction is everything. Once a court lacks jurisdiction it cannot take even one step in a proceeding. It is therefore possible to argue that, by failing to include the power to punish for contempt committed outside court or for wilful disobedience of court process, the 2013 Bill denies the superior courts power to punish for civil contempt of court thereby compromising the effectiveness of this branch of the law.

#### ***4.4:2 The power to Punish for Civil Contempt by Subordinate Courts***

Under the current legislation, the subordinate courts can only punish for disobedience of an order of injunction.<sup>279</sup> However, under the 2013 bill, the subordinate courts are granted

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<sup>276</sup> Smith, n 77.

<sup>277</sup> Contempt of Court Bill, 2013, clause 8(1).

<sup>278</sup> *Caltex Oil Kenya Ltd v The Owners of Motor Vessel Lilian 's'*, n 203.

<sup>279</sup> Section 63 (c) of the Civil Procedure Act, Chapter 21 of the Laws of Kenya and Order 40 rule 3 of the Civil Procedure Rules.

power to punish for criminal contempt only. In providing for the subordinate court's jurisdiction, the Bill provides as follows:<sup>280</sup>

Every subordinate court shall have power to punish for contempt of court on the face of the court in any case where a person: -

assaults, threatens, intimidates, or willfully insults a judicial officer or a witness, during a sitting or attendance in a court or in going to or returning from the court to whom any relevant proceedings relate:

willfully interrupts or obstructs the proceedings of a subordinate court in the court; or

willfully disobeys an order or direction of a subordinate court in the course of the hearing of a proceeding" (Emphasis supplied)

The foregoing clearly refers to contempt of court on the face of the court which is exclusively criminal and not civil. This means, that under the 2013 Bill, the subordinate court will have no power to punish for civil contempt of court. However, the current limited power which the subordinate court has to punish for breach of an order of injunction made by such subordinate court under section 63 (e) of the Civil Procedure Act and Order 40 Rule 3 of the Civil Procedure Rules is retained by dint of clause 34 of the Bill. Since the proposed Act of Parliament is meant to limit and define the powers of courts in punishing for contempt of court, all the powers intended for the subordinate court, including the one of punishing for breach of an injunction, should be spelt within the proposed Act.

#### ***4.4:3 Limitations of Actions for Contempt of Court***

Under the current legislation, there is no limitation for instituting contempt proceedings for breach of an order of court. The only known limitation is under section 4 (4) of the Limitation of Actions,<sup>281</sup> which limits actions to enforce judgments and orders to twelve (12) years.

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<sup>280</sup> Contempt of Court Bill, 2013, clause 5.

<sup>281</sup> Limitation of Actions Act, Cap 22 Laws of Kenya.

However, under the 2013 Bill, a time limit of six (6) months has been imposed for initiating any proceedings for contempt of court.<sup>282</sup> The Bill is categorical that no proceedings for contempt can be initiated either by a court on its own motion or otherwise after the expiry of six (6) months from the date on which the alleged contempt is committed. Since the Bill does not differentiate between criminal contempt and civil contempt, that limitation is applicable to all acts of contempt. This is prejudicial in that nowhere in the Bill is there provision for extension of time. In this regard, if for any reason, whether plausible or otherwise, a party delays for any period of up to six (6) months before commencing civil contempt proceedings with a view to enforce compliance, the contempt shall remain to persist thereafter notwithstanding any continued breach of a court order or judgment or direction. This is a serious flaw in the Bill.

#### ***4.4:4 Punishment for Contempt of Court***

Currently, the punishment to be meted out against contemnors is either committal to civil jail and/or by a fine, or sequestration of a contemnor's property. The period of committal is limited to six (6) months while the amount of fine is not limited. The amount of such fine is therefore left to the discretion of the court depending on the severity of the contempt. Further, the value of the property to be sequestrated is not limited. It is in the discretion of the court.

However, under the 2013 Bill, both the period of committal and fine is limited. The Bill provides for a maximum period of six (6) months for committal to civil jail and for a maximum fine of Kshs.200,000/- or to both. This is the punishment that is provided for

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<sup>282</sup> Contempt of Court Bill, 2013, clause 33.

human contemnors. For corporate or state organs, the amount of fine provided for is up to Kshs. 1 Million. The proposed punishment is far too lenient considering that civil contempt of court is a serious threat to the administration of justice and rule of law. Whilst the proposed punishment may be adequate for a criminal contempt, our view is that the same is not the case with civil contempt of court. This is so considering that in civil proceedings, the claims may extend to billions of shillings.

In this regard, orders may be directed against acts that are meant to forestall permanent damage and/or immense expense. A party faced with such an order may choose to disobey the order at the pain of such a lenient punishment. For example, in cases of eviction, demolition of premises, disposal of property or assets, the temptation to disobey such orders is high. Our view is that contempt of court being a serious offence that threatens cohesion in society, the administration of justice and the rule of law, sanctions therefor need likewise be stiff and deterrent.

#### ***4.4:5 Procedural Defects***

The Bill proposes to repeal section 5 of the Judicature Act. However, it is silent on the procedure that will be applicable under the proposed law. The Bill only empowers the Chief Justice to make the rules of procedure under clause 36. In our view, the Bill should have provided that such rules should be made by the Rules Committee created by the Civil Procedure Act. That committee would be a proper forum as it involves a large number of stakeholders. It is a serious flaw, in our view, to have restricted the rule making function to the Chief Justice alone on such an important branch of law that has been so problematic.

#### **4.5. Conclusion**

In this chapter we have considered the provisions of the Contempt of Court Bill, 2013. We found the basis of the Bill as contained in its objectives to be in tandem with the judicial basis for contempt of court in Kenya as considered in Chapter 3 of this study. We also considered the jurisdiction of the various courts to punish for civil contempt of court and concluded that the Bill does not give the courts any jurisdiction to punish for civil contempt of court.

We have also considered the flaws or limitations contained in the 2013 Bill. This includes the six (6) months period given within which to initiate contempt proceedings and the lenient punishment provided for civil contempt of court. In the following chapter, we make recommendations on the necessary reforms that will make the law of civil contempt of court in Kenya effective.

## CHAPTER 5: SUMMARY OF FINDINGS, CONCLUSIONS AND RECOMMENDATIONS

### 5.1 Summary of Findings

#### *5.1.1 Origin and Historical Development of Civil Contempt of Court*

The law of contempt has ancient origins and has evolved over time through the various phases of the English monarchical legal system in English law.<sup>283</sup> The primary function of the early monarch was the protection of his subjects and consequent administration of justice. The power of courts to punish for contempt is traceable to the undelivered judgment of Wilmot J in *Rex v Almon*<sup>284</sup> which was written in 1765. The writ of attachment was a prerogative of the king to preserve peace and enforce obedience. It was later extended to disobedience of orders by judges who exercised the same on delegated power from the king himself. Between the 14<sup>th</sup> and 18<sup>th</sup> centuries, the jurisdiction of the English Judges to punish contempt summarily was only limited to criminal proceedings. However, in the latter part of the 18<sup>th</sup> century, this jurisdiction extended to the arena of disobedience of civil orders.

The basis for the law of civil contempt of court is not for the courts to protect themselves, but to uphold the rule of law as contempt of court flouts justice itself. Although contempt may be of a civil nature, it is said to partake of a criminal nature. Therefore, the safeguards availed to an accused in a criminal trial likewise apply to an alleged contemnor in committal proceedings. Although a civil contempt is essentially a wrong done to a person who is entitled to the benefit of the order in issue, it nevertheless involves an obstruction of the fair administration of justice which is a public interest and

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<sup>283</sup> Bowrie and Lowe (n 14) 1.

<sup>284</sup> Fox (n 85).

may accordingly be punished in the same manner as a criminal contempt. In monarchical England, the principles upon which contempt was based on for which punishment was inflicted, was to restrain disobedience to the commands of the king and his courts as well as acts which tended to obstruct the course of justice.

Committal for contempt of court is a major remedy in civil litigation. However, since the liberty of a subject is at risk, the procedure thereof must be strictly complied with. These strict procedural requirements were hitherto found in Order 52 of the RSC. These were to the effect that the order must be clear and unequivocal; the order with a penal notice appended thereon must be served personally upon the alleged contemnor; leave to commence contempt proceedings must be obtained and that service of the notice thereof must be effected upon the crown one day before the application for leave is lodged.

In 2012, England undertook amendments to its Civil Procedure Act whereby the Rules of the Supreme Court concerning contempt of court were replaced with Part 81. This part makes extensive provisions regarding committal proceedings which make the procedure for committal clearer, easier and certain. It makes far reaching improvements on the hitherto strict requirements for personal service of orders in that, knowledge of the order is now superior to service. It is also no longer a requirement to serve the crown with the notice of the application for leave. Finally, committal proceedings may now be determined through oral evidence thereby diminishing the likelihood of the alleged contemnor being prejudiced or wrongly committed.

### ***5.1.2 The Law of Civil Contempt of Court in Kenya***

The power of courts to punish for contempt of court is to safeguard the administration of justice and the rule of law. It is also meant to safeguard and maintain the dignity and

authority of the courts which are the impartial institutions that are constitutionally mandated to determine disputes in society. Punishing for contempt of court has nothing to do with the integrity of the judiciary or personal ego of the judge himself.

Presently, the law on civil contempt of court applicable in Kenya is the law applied by the High Court of justice of England. This is imported by section 5 of the Judicature Act. Hitherto, the English procedural law of civil contempt was to be found under Order 52 of the RSC which set out strict procedural requirements. These included, inter alia; personal service of the order with penal notice upon the alleged contemnor; application for leave before making the substantive application for committal and service of notice of such application upon the crown. While vigorously enforcing these requirements, the Kenyan courts have had to strike out many committal proceedings because of the complicated and confusing procedural rules.

The other jurisdiction for punishing for civil contempt in Kenya is to be found in section 63 (c) of the Civil Procedure Act as read with Order 40 Rule 3 of the Civil Procedure Rules. This relates to breach of orders of injunction. Although this does not import the strict requirements found in the English law of civil contempt, the Kenyan courts have found themselves in a dilemma whether or not to insist on the strict requirements in the RSC or to plainly exercise this jurisdiction without resorting to the English procedures. As a result of the confusion, many committal proceedings brought under section 63(c) have been struck out for none compliance with the aforesaid strict requirements contained in the English law.

The current procedural law in England, after the 2012 amendments, have done away with certain procedural requirements thereby making it a little bit easier and certain. Such

requirements as to personal service and service of the notice upon the crown has been done away with as is the requirement for leave. However, the Kenyan courts have continued to apply the law as previously contained in Order 52 of the RSC thereby compromising the effectiveness of the law of civil contempt of Court in Kenya.

### ***5.1.3 The Contempt of Court Bill, 2013***

The first bold attempt that has been taken by way of law reform to develop a home grown law of contempt is the publication of the Contempt of Court Bill, 2013. The Bill repeals section 5 of the Judicature Act that imports English law of contempt as relates to the power to punish for contempt.

Clause 34 of the Bill is to the effect that the provisions of the Bill are in addition to and not in derogation of the provisions of any other written law. This retains the present jurisdiction to punish for disobedience of injunctive orders provided for under section 63(c) of the Civil Procedure Act as read with Order 40 Rule 3 of the Civil Procedure Rules.

The Bill does not make a distinction between criminal and civil contempt. However, it makes provisions on civil contempt in clauses 3 and 8. These include the overriding objectives that include upholding the dignity and authority of the court by ensuring compliance with court processes. It also contains a wide definition of civil contempt that encompasses any disobedience of any civil court processes.

Clause 36 of the Bill provides for the Chief Justice to make rules of procedure to give effect to the provisions of the proposed Act. It is expected that it is in these rules that the hitherto complicated procedural legal requirements in the English law will be done away with to make it easier for parties to undertake committal proceedings in Kenya.

Clause 28 provides for sanctions for contempt of court. The committal to civil jail is limited to a maximum of six (6) months and a fine of Kshs.200,000/= for individual contemnors and Kshs.1,000,000/- for corporations or state organs. These sanctions are too lenient considering the serious consequences that contempt of court has on the administration of justice and the rule of law. The law of civil contempt of court has been successfully applied in England from where it was imported by Kenya. Its application in Kenya however, has not been successful because of the existence of two jurisdictions for civil contempt of court. This calls for legal reform to this branch of the law. The bold attempt in publishing the Contempt of Court Bill, 2013 has not made it any easier because of certain flaws that are within the Bill.

## **5.2 Conclusions**

This study has discussed the historical origin and development of the law of contempt of court. It has established that the law of contempt has ancient origins and that it has evolved over time through the various phases of the English monarchical legal system. That the primary functions of the king being the protection of his subjects and consequent administration of justice, his position had to be beyond question. That this authority of the king later on came to be vested in the office of the judge, as a direct representative of the king in the administration of justice. That in order to enforce their orders, courts developed the writ of attachment whereby those who disobeyed their orders were brought before them for punishment. This was meant to enforce compliance with the processes of the administration of justice.

The basis of courts punishing for civil contempt of court is not necessarily to protect themselves but to uphold the rule of law and to protect the administration of justice. It

has nothing to do with the personal ego of the presiding judge. It is in the public interest that the judicial authority in society not only be upheld but the institutions established to preside over disputes must be effective in the discharge of their functions. The purpose of the jurisdiction to punish for civil contempt of court is therefore not only for the protection of judicial dignity but also for the prevention of interference with the administration of justice or the maintenance of the court's authority and the effectiveness of its orders. Its only when court orders or processes are effective that society can guard itself from anarchy.

The practice and procedure in England for the law of civil contempt of court was hitherto governed by the Rules of the Supreme Court, Orders 45 and 52 thereof. Under those rules, there were very strict procedural requirements for committal proceedings. These included; personal service of the order with penal notice upon the alleged contemnor; service of statutory notice upon the crown office before commencing any proceedings for contempt and application for leave to commence contempt proceedings. By the 2012 amendments to the English Civil Procedure Act, the RSC concerning contempt of court have been replaced by Part 81 which has relaxed the foregoing strict procedural requirements. It has done away with, inter alia, the service of statutory notice upon the crown office; personal service where knowledge can be proved as well as leave in certain instances. Under Part 81 aforesaid, the procedure in committal proceedings has been made more certain and clearer.

The law of civil contempt of court in Kenya is largely governed by the English law of contempt. This is by virtue of section 5 of the Judicature Act, importing the practice and procedure in England. That section provides that the High Court and the Court of Appeal

shall have power to punish for contempt of court as exercised by the High Court of justice in England. By this importation of the English practice and procedure, the Kenyan courts have strictly applied the stringent procedural requirements in the RSC whereby many committal proceedings have been struck out for failing to comply with those requirements. As a result, even where there has been outright civil contempt of court, courts have been unable to enforce compliance by way of committal for the reason that the committal proceedings have failed to meet the criteria or have fallen short of the aforesaid strict procedural requirements.

The other jurisdiction exercised by the Kenyan courts to punish for civil contempt of court is under section 63(c) of the Civil Procedure Act as read with Order 40 Rule 3 of the Civil Procedure Rules. This concerns disobedience of orders of injunction. Although under this jurisdiction there are no strict procedural requirements, the Kenyan courts are split as to the procedure applicable. While other courts have proceeded to apply the procedure as set out in the Civil Procedure Rules, others have insisted on the strict application of the English practice and procedure and thereby dismissed applications brought under this jurisdiction. That has left the law of civil contempt of court in a state of confusion in Kenya.

Although by virtue of the 2012 amendments to its Civil Procedure Act, England has moved away from the aforesaid strict procedural requirements in contempt proceedings, Kenyan courts are oblivious of these amendments and have continued to apply the old law thereby causing an injustice to the litigants.

As a step to the right direction, the Contempt of Court Bill, 2013 has been published. It is the very first bold step of having Kenya's own law on both criminal and civil contempt of

court. The Bill proposes to repeal section 5 of the Judicature Act and therefore do away with the application of the English law of contempt of court. However, the Bill is not without shortcomings. The Bill proposes sanctions that are too lenient considering the offence of contempt of court. The Bill also fails to specifically give power to the superior courts to punish for civil contempt of court. It also limits the period within which committal proceedings can be commenced to six (6) months from the date of contempt. As regards the procedural technicalities that have bedevilled this branch of law for decades, clause 36 leaves it to the Chief Justice to make the rules. It is hoped that when those rules are finally made, they shall make the practice and procedure in committal proceedings certain and easier. It is only if the law in this area is certain that enforcement of civil court orders by way of committal proceedings can be effective.

This research has emphatically answered the research questions set out in Chapter 1. It has set out the status of the law of Civil Contempt of Court in Kenya and shown the defects that exist in this law. It therefore proceeds in the following section to give the legal reforms that are required to make it effective.

### **5.3 Recommendations**

On the basis of the foregoing findings, our recommendations on how the law of civil contempt of court in Kenya can be more effective are as follows: -

#### ***5.3:1 Need for an autochthonous law of civil contempt of court***

In this study it was established that the current law of civil contempt of court applicable in Kenya is the English law of contempt. This was previously to be found in the RSC and now Part 81 of the English Civil Procedure Act. The Kenyan Courts have variously

lamented about the lack of our own Kenyan law of civil contempt of court.<sup>285</sup> Section 5 of the Judicature Act directs the Kenyan courts to apply the law for the time being applicable in England. However, since that law is not readily available, the Kenyan courts have had to grapple in darkness and many a times applied the law that has been repealed in England and therefore no longer law thereby causing prejudice to the litigants. A good example is that even after the 2012 amendments in England, the Kenyan Courts have continued to apply Order 52 of the Rules of the Supreme Court.<sup>286</sup>

It is, therefore, recommended that there should be an enactment of our own law of civil contempt of court. That law should exhaustively provide for both substantive and procedural law of civil contempt of court. The attempt by way of the proposed Contempt of Court Act, through the 2013 Contempt of Court Bill is a welcome step. The proposed repeal of section 5 of the Judicature Act will result in the doing away of the English law of contempt of court and having an own law of civil contempt of court. Notwithstanding the loopholes pointed out in the said proposed Act, it is recommended that the same should be enacted and any flaws therein can be dealt with by way of amendments.

### ***5.3:2 Need for Simplified Procedural Rules***

Part 81 of the English Civil Procedure Act makes detailed but simplified procedural rules for committal proceedings thereby making it easier and certain to enforce court orders when there has been breach.

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<sup>285</sup> *Gitobu Imanyara v R*, n 186. See also *Isaac Wanjohi & Anor v Rosaline Macharia* NBI HCCC No. 450/95 (UR) and *Republic v County Council of Nakuru ex parte Edward Alera T/a General Reliance Equipment & 2 others*, n 215.

<sup>286</sup> *Simon Kimani v Geoffrey Kimani Gathigi & Anor* [2014] eKLR—where knowledge other than through personal service was rejected by the Court—See also *Jane Nduta Maina v Muthoni was Monica* Nrb HC. Misc. Appl. No. 234 of 2012 (UR) where the court struck out an application for leave on the basis that the same was not supported by a statement of facts. By then leave had already been done away in England by Part 81 of the English Civil Procedure (Amendment) Rules.

Section 36 of the proposed Contempt of Court Act provides for rules to be made by the Chief Justice for effecting the provisions of the aforesaid Act. We propose that the said rules need take the line of Part 81 of the English Civil Procedure Act with appropriate modifications. They should be simple and clear so as not to be an impediment to access to justice as has been the case before. Any stringent procedural requirements that were hitherto a bottleneck to committal proceedings, such as service of notice upon the Attorney General (or DPP), leave and personal service as opposed to knowledge of the order, should be done away with in those rules. This will make the process of enforcement of civil court orders by way of committal proceedings easier and therefore effective.

### ***5.3:3 Empowering Subordinate Courts to Punish for Contempt of Court***

Currently, it is only the High Court, Court of Appeal and Supreme Court that have jurisdiction to punish for civil contempt of court. The subordinate courts can only punish where their own orders of injunction have been disobeyed. Subordinate courts cannot enforce any of their other civil orders by way of punishing for contempt of court. That has to be done by the High Court under its supervisory jurisdiction.

The majority of civil cases in Kenya are litigated in the subordinate courts because of their being courts of first instance and also their increased pecuniary jurisdiction of up to Ksh.8 Million. The rate of breach of civil orders therefore is expected to be high at that level. It is suggested that instead of having the High Court or any superior court intervene on behalf of a subordinate court in the event of disobedience, it is suggested that the subordinate courts should be allowed to punish for contempt of their own civil orders as is the case with orders of injunction. It is expensive for a party who has been successful

in the subordinate court to once again commence fresh proceedings for committal in the High Court or other Superior Court, in an attempt to enforce his success in the subordinate court once impeded by disobedience. The subordinate courts should first exercise that jurisdiction with a right of appeal to the High Court in the normal manner.

#### ***5.3:4 Need for Enhanced Sanctions for Contempt of Court***

Contempt of court is a serious offence. It is an affront to justice itself. It is a direct challenge to judicial authority, administration of justice and the rule of law. A challenge to the rule of law is to court anarchy. Where judicial authority loses meaning and/or significance by failing to give appropriate and effective remedy, the law of the jungle takes over resulting in anarchy. This is where Kenya found itself in the chaos that followed the 2007 general elections when those disputing the election results resulted to self-help rather than judicial process to determine the election dispute.

In this regard, any act that undermines judicial authority is a direct threat to the rule of law and must be dealt with speedily, viciously and effectively.

In the proposed Contempt of Court Act, the sanctions proposed for civil contempt of court is committal to civil jail for six (6) months and/or a fine not exceeding Ksh.200,000/- for individuals. For corporations, it is a fine of Kshs.1,000,000/- (one million). It is suggested that these sanctions are too lenient considering the gravity of the offence. Civil disputes involving corporations sometimes run to billions of shillings. A corporation may choose to sacrifice a six (6) month civil jail for one of its officers and a paltry fine of Kshs.1,000,000/- if only it has to push on with its agenda in a multimillion or billion deal or dispute. It is suggested that while the jail term should be capped at two (2) years, the fine should be left to the discretion of the sentencing court depending on the

severity of the breach, e.g. demolition of a multi-million building, disposal of a multibillion property under dispute, eviction and destitution of people among others. The punishment for civil contempt of court should be deterrent. In the United Kingdom, Committal to jail is for up to two (2) years and the fine is unlimited. This should be the case in Kenya.

**APPENDIX 1: RESEARCH TOOL**

**Judges Questionnaire**

A CRITICAL REVIEW OF ENFORCEMENT OF CIVIL COURT ORDERS IN  
KENYA WITH SPECIAL REFERENCE TO THE LAW OF CONTEMPT OF COURT  
FIELD RESEARCH QUESTIONNAIRE

This questionnaire is part of a Research on the state of the enforcement of Civil Court Orders in Kenya in relation to the Law of Contempt. The Questionnaire is to be administered only to Judges (both of the Court of Appeal and High Court), and Advocates practicing within Nairobi.

The following Research Questions are directed to you to enable the Researcher evaluate how the current status of the Law of Contempt has been effective in the enforcement of Civil Court Orders in Kenya.

A) FOR JUDGES

1. Your Names (Optional).  
.....
2. Which Court or Division are you currently serving?  
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3. How long have you served in the bench?  
(Optional).....

4. In your experience on a count of 1 to 10, how would you rate the rate of compliance of Civil Court Orders?

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5. Are you aware of any civil matter which you have handled where an order issued was not complied with?

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6. If your answer in No. 7 above is yes, why was the order not obeyed?

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7. Do you recall any steps that the party in favour of whom the order was made undertook to ensure compliance? If yes, what steps and how successful or effective were those steps?

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8. Have you ever handled an application for contempt of court?

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9. (a) If the answer to No. 8 above is yes, did the application for committal or sequestration succeed?

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(b) What punishment was meted out?

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(c) In your view, was the punishment adequate? Why?

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10. If the application failed, what do you think was the reason for failure?

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11. In your view, do you think the procedure as laid down in our law books for enforcing civil court orders by way of Contempt of Court is effective?

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12. What is your view regarding the procedure in our law regarding Contempt of Court in relation to the following?

a. Standard of proof required.

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b. Requirement for leave, to apply for committal or order of sequestration and other attendant requirements?

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c. Requirement for personal service.

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d. Requirement for personal service vis a vis knowledge of the court order— which one should be superior?

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e. Requirement for clarity of the order.

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f. Requirement for appending a Notice of Penal Consequences on the order.

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13. In your view, do you think our law as it stands now, to wit, section 5 of the Judicature Act and Order 40 Rule 3(2) of the Civil Procedure Rules (as read with section 63 (c) of the Civil Procedure Act) is effective in ensuring compliance of Civil Court Orders?

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14. If your answer in No. 13 above is in the negative, what do you think should be the way forward in relation to the following (Answering the separate sheet provided

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a) The role of the courts in contempt matters;

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b) The role of the advocates in contempt matters;

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c) The status of our law;

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d) Any other matter which you think is important.

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NB. I appreciate your patience in having taken your precious time to answer this questionnaire.

**Advocates Questionnaire**

A CRITICAL REVIEW OF ENFORCEMENT OF CIVIL COURT ORDERS IN KENYA WITH SPECIAL REFERENCE TO THE LAW OF CONTEMPT OF COURT

FIELD RESEARCH QUESTIONNAIRE

This questionnaire is part of a Research on the state of the enforcement of Civil Court Orders in Kenya in relation to the Law of Contempt. The Questionnaire is to be administered only on Judges (both if the Court of Appeal and High Court), and Advocates practicing within Nairobi.

The following Research Questions are directed to you to enable the Researcher evaluate how the current status of the Law of Contempt has been ineffective in the enforcement of Civil Court Orders in Kenya. **The responses given shall be treated with utmost confidence and will not be used otherwise that for the purposes of the research.**

B. ADVOCATES

1. Full Names (Optional)

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2. In which law firm or organization do you practice?  
.....

3. How long have you been in practice? (Optional).  
.....

4. In your experience on a count of 1 to 10, how would you rate the rate of compliance of Civil Court Orders in Kenya?  
.....

5. Do you recall any civil matter which you have handled where an order issued in favour of your client was not complied with?  
.....

6. If your answer is No. 7 above is yes, why was the order not obeyed?

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7. Do you recall if you ever advised your client to take steps to ensure compliance and if so, what was his/its reaction?  
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**8.** Have you ever handled an application for civil contempt of court?

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**9.** a) If the answer to No. 8 above is yes, did the application for committal or sequestration succeed?

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b) What punishment was meted out?

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c) In your view, was the punishment adequate? Why?

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**10.** If the application failed, what do you think was the reason for failure?

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**11.** In your view, do you think the procedure as laid in our law books for enforcing civil orders by way of Contempt of court procedures is effective?

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**12.** What is your view regarding the procedure in our law regarding Contempt of Court in relation to the following?

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a) Standard of proof required.

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b) Requirement for leave, to apply and other attendant requirements e.g. giving notice to the Attorney General?

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c) Requirement for personal service.

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d) Requirement for personal service vis a vis knowledge of the court order.

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e) Requirement for clarity of the order.

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f) Requirement for appending a Notice of Penal Consequences in the order.

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**13.** In your view, do you think our law as it stands under section 5 of the Judicature Act and Order 40 Rule 3(2) of the Civil Procedure Rules as read with section 63(c) of the Civil Procedure Act is effective in ensuring compliance of Civil Court Orders?

.....  
.....

**14.** If your answer in No. 13 above is in the negative, what do you think should be the way forward in relation to the following?

a) The role of the courts in contempt matters;

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b) The role of the advocates in contempt matters;

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c) The status of our law;

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d) Any other matter which you think is important

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NB. Thank you for taking time to respond to this questionnaire.

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