



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 11 OF 2018

**IN THE MATTER OF ARTICLE 1, 2, 3, 6, 10, 19, 20, 22, 23, 24, 165, 174,
175, 201, 207, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF THE ALLEGED CONTRAVENTION AND/OR APPREHENDED
CONTRAVENTION OR BREACH OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF INTERPRETATION OF ARTICLES 201 AND 207
UNDER ARTICLE 165(2)(D) OF THE CONSTITUTION OF KENYA 2010.**

AND

IN THE MATTER OF ARTICLES 2(5), (6) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF ARTICLES 11 OF THE INTERNATIONAL
COVENANT ON CIVIL AND POLITICAL RIGHTS**

AND

IN THE MATTER OF THE COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

IN THE MATTER OF THE PUBLIC FINANCE MANAGEMENT ACT NO. 18 OF 2012

AND

**IN THE MATTER OF THE PROTECTION OF FUNDAMENTAL ECONOMIC
RIGHTS OF THE RESIDENTS, CITIZENS OF NAIROBI CITY COUNTY**

BETWEEN

NAIROBI CITY COUNTY.....1ST PETITIONER

GOVERNOR NAIROBI CITY COUNTY.....2ND PETITIONER

VERSUS

NDIUCO LIMITED1ST RESPONDENT

GINU POWER ENGINEERING LIMITED.....2ND RESPONDENT

AND

THE HONOURABLE ATTORNEY GENERAL.....1ST INTERESTED PARTY

PARK TOWERS LIMITED2ND INTERESTED PARTY

JUDGMENT

PETITION

1. The Petitioners through a Petition dated 12th January 2018 supported by affidavit by Gedion Mike Mbuvi Kioko sworn on even date seek the following

a) A declaration that resonating the intention of Articles 201 (d) and (e), 207 (2), of the Constitution of Kenya and Sections 31(d) as read together with Section 30(3)(f) and of the County Government Act, 2012, that the Nairobi City County through the Governor can issue a moratorium staying all payments by the County to its creditors pending relevant appropriation, scrutiny and audit in order to safeguard the constitutional principles of devolution and public finance.

b) An order directing the Governor of the Nairobi City County to issue a moratorium staying all payments by the County to its creditors, for a period of between 6 to 12 months pending relevant appropriation, scrutiny and audit in order to safeguard the Constitutional principles of devolution and public finance.

c) A declaration that county Governments enjoy similar immunity as the National Government enjoys under the Government Proceedings Act hence any execution of a decree against Nairobi City County via the provisions of Part IV of the civil Procedure Rules, 2010 is irregular, null and void.

d) A Declaration that any order for the arrest and detention in civil jail of Nairobi City County finance officers for failure by Nairobi City county to meet its contractual obligations goes against Article 39 of the Constitution and Article 11 of the International Covenant on Civil and Political Rights and therefore illegal.

e) An order that all pending executions against Nairobi City County specially those arising out of claims filed against the defunct City Council of Nairobi and those filed against the previous administration of Nairobi City County be forthwith suspended for a period not exceeding six (6) months pending the auditing, budgeting, allocation and approval of the amounts decreed through the procedures provided for under the County Government Act No. 17 of 2012 and Public Finance Management Act, 2012.

THE 1ST RESPONDENTS RESPONSE

2. The 1st Respondent is opposed to the Petitioners Petition. The 1st Respondent is Judgment Creditor and the 1st Petitioner a Judgment debtor out of the decree of the **High Court in HCCC No. 493 of 1991 Ndiuco Limited vs. Nairobi City Council** arising from the act of the Petitioners, where they obtained money from the 1st Respondent under the guise of auctioning property for rates recovery, which property they never transferred to the 1st Respondent but facilitated the rates defaulter to transfer to third parties, and thereafter refused to refund the 1st Respondent's money back. These acts the 1st Respondent state constitute obtaining money by fraud and misrepresentation.

3. The Petitioners admit knowledge of the Judgment and Decree of the Court and have annexed it in their Petition. The Petitioners have also calculated and verified the amounts due under the decree and by their own calculation admit owing the Petitioners Kshs.299,375,214.60 as at 3rd March, 2015. Further, it is indisputable that the Petitioners have not appealed the judgment, decree or orders of the **High Court in HCCC No. 493 of 1991** nor have they sought stay of the said decree in the said suit.

4. It is 1st Respondents aver that the Petitioners having full knowledge of the decree and the amounts due, the Petitioners have deliberately and wilfully refused, ignored and neglected to fully satisfy the same. The 1st Respondent contend that instead the Petitioners have approached, this Constitutional Division of the High Court to allow them to stay the payment of the said amounts as ordered by the Civil Division of the same Court, fully knowing this Court does not have power to stay or review the decision of a Superior Court of the same status. That even before the Court grants the orders sought it is urged that, the Petitioners have stayed the payment of the same and moved to form a Committee to review among others, the decision of the **High Court in HCCC No. 493 of 1991**, with a view to recommend whether the Petitioners will pay the decretal sums or not.

5. It is contended by the 1st Respondent that the Petition, as filed, underscores a worrying trend by the state, the government and state officers of treating compliance with Court Orders, judgments, decrees and decisions as **discretionary**, and put into a doubt the confidence of law abiding persons in the ability and capacity of the Courts and the Judiciary to maintain and enforce the rule of law. This it is urged is

disastrous to the administration of justice and the existence of Kenya as a civilised democracy governed by the rule of law as dictated in the Constitution.

6. The 1st Respondent opposes the Petition which the 1st Respondent urges is ripe for dismissal, and prays that the prayers sought in the Cross Petition, which is undefended, be granted as prayed.

CROSS – PETITION

7. The 1st Respondent through a Cross-Petition dated 26th February 2018 supported by Supporting Affidavit of Paul Ndiu sworn on the even date seek the following reliefs against the Petitioners:-

- a) *A declaration be and is hereby issued that the Petitioners by their own evidence admits the knowledge of the Court Orders, decree and taxed costs issued in HCCC No. 493 of 1991 and that from their issue to date, the Petitioners have refused, neglected and disobeyed the said orders.*
- b) *A declaration be and is hereby issued that the Petitioners by their own evidence, confirm that instead of complying with the Court orders in full, have only been making token payments occasionally.*
- c) *A declaration be and is hereby issued that the Petitioners acknowledges the Court order which is still in force and admits an outstanding payment of Kshs.299,375,214 as of 3rd March 2015, which continues to attract interests.*
- d) *A declaration be and is hereby issued that the acts and/or intention of the Petitioners to appoint a group of individuals to review the High Court order or awards issued in favour of the 1st Respondent is without jurisdiction in that interpretation and review of a Court Order is vested in the Court and such review of Court orders by a group of individuals shall be invalid, null and void.*
- e) *A declaration be and is hereby issued that the failure to comply with the Court Order issued in favour of the 1st Respondent by the Petitioners is wilful, subversion of the rule of law and is deliberately intended to cause serious eradication of the dignity and authority of the Court.*
- f) *A declaration be and is hereby issued that the failure of the Petitioners to serve the 1st Respondent with the pleadings in this matter is in bad faith and is intended to oppress and injure the 1st Respondent.*
- g) *A declaration be and is hereby issued that the Court having regard to the sequence of events and gravity of the Petitioner's explicit and clear deliberate sub-version of justice, their acts are without doubt prejudicial to the 1st Respondent and an infraction of Court Orders.*
- h) *A declaration be and is hereby issued that being the oldest claim in its books and having paid more recent claim, the failure to pay the amount as decreed by the judgment of the Honourable Court is in bad faith, unfair, inordinate and a violation of the 1st Respondent right to access to justice, and fair administrative action.*
- i) *A declaration be and is hereby issued that the 1st Respondent's claim being the oldest claim against the Petitioners, it is only fair that the 1st Respondent be paid first before any other person is paid and is hereby so ordered.*
- j) *The Honourable Court be pleased and hereby orders that the Petitioner are not allowed to take an unfair advantage of the 1st Respondent by deliberately disobeying Court Orders and escape the consequences and the Petitioners be and are hereby ordered to comply with the Order of the Court in HCC No. 493 of 1991 within 21 days from the date hereof.*
- k) *The Honourable Court be pleased to and hereby orders that it is a policy of the Court to set the wrongs against the 1st Respondent by the Petitioner's right and not to allow the perpetuation of the wrong-doing by the Petitioners striking the very root of the rule of law on which the legal system rests and that the Petitioners striking the very root of the rule of law on which the legal system rests and that the Petitioners must comply with the Court Order with immediate effect.*
- l) *The Honourable Court be and is hereby pleased, in its sacred duty of administering justice and protecting its dignity, authority and respect, to orders that the Petitioner to make all payments due as admitted to the 1st Respondent within 21 days from the date hereof.*
- m) *The Honourable Court be pleased to and hereby issues a conditional order that on the failure to comply with the orders issued herein as directed within 21 days, the 2nd Petitioner be held to be in contempt of Court.*
- n) *The Petition dated 12th January, 2018 it relates or concerns the 1st Respondent be and is hereby dismissed with Costs to the 1st Respondent.*
- o) *The Honourable court be pleased to grant any other relief it deems fit to ensure expeditious payment of the 1st Respondent's claim.*

p) The 1st Respondent be awarded the costs of the Cross-Petition with interests at court rates.

THE PETITIONERS RESPONSE

8. The Petitioners though duly served did not file any response to the Cross-Petition.

THE 2ND RESPONDENTS RESPONSE

9. The 2nd Respondent is opposed to the Petitioners Petition and in doing so filed a Replying Affidavit by Ngugi Njru sworn on 14th April 2018.

THE 1ST INTERESTED PARTYS RESPONSE

10. The 1st Interested Party is opposed to the Petitioners' Petition. It is contended by the 1st Interested Party that it represents the National Government and that the Petitioners have in their own structure incorporated a County Attorney under the Nairobi City County Office of the County Attorney, it therefore comes as a surprise to the 1st Interested Party that the Petitioners have chosen to be represented by a private law firm. In the circumstances, the joining of the Attorney General as a party in the proceedings is clearly in bad faith and the 1st Interested Party submit that the Attorney General should be excused from these proceedings.

11. It is 1st Interested Party's contention that the Petitioners Petition and, the relief of stay sought will have the ultimate effect of countermanding, interdicting and reprimanding the various orders of the Court pending their verification by a non-judicial body. It is submitted that such a forum or committee has no jurisdiction to interpret or review Court Orders and in the event of the committee making an order affecting a Court Order, such a decision, finding, pronouncement is contemptuous of rule of law, constitutionalism, and this Court's procedure and thus null and void *ab initio*.

12. Further it is urged that the prayers sought by the Petitioners if granted will in effect provide a blanket stay of the execution of valid Court orders from various superior Courts, outside the statutory restraints of the Civil Procedure Act.

13. The 1st Interested Party in addition thereto contended that it is settled that failure to comply with Court Orders attracts serious consequences. Based on the Petitioners own submission it is averred that it is quite evident that they are/have been aware of the existence of the various Court Orders, that they seek to stay. It is in addition urged that the Prayers sought in the Petition relates to parties disclosed in the Affidavit and the Petition, but who are not joined in the Petition as parties.

14. It is further 1st Interested Party's case that the Petition does not reveal any violation of the Constitution or rights by the Honourable Attorney General or any Government Department, and it reveals no constitutional question ripe for determination by the Court.

ATTORNEY GENERAL CASE

15. The Attorney General avers that the Petition does not raise constitutional issues affecting the Attorney General.

16. That the Parties who are owed and/or decree holders ought to have been made parties to the Petition and not the Honourable Attorney General.

17. The Attorney General is of the position that the orders sought by the Petitioners cannot be granted by this Court since this Court does not have power or jurisdiction over judges of Superior Courts or to review or stay decisions from other Superior Courts.

18. The Attorney General contend that since no execution or attachment can issue against the Petitioners, the only mode of enforcing the same is by prayer for orders of mandamus to compel the satisfaction of the Court Decrees, which this Court has powers to grant under **Article 23 of the Constitution**.

THE 2ND INTERESTED PARTY'S RESPONSE

19. The 2nd Interested Party is opposed to the Petition and relies on the Replying Affidavit of the 2nd Interested Party by Francis Kirungie Ngatia sworn on 18th April 2019.

THE 4TH INTERESTED PARTYS RESPONSE

20. The 4th Interested Party is opposed to the Petition and has filed a reply to the Petition stating amongst other grounds that it has no statutory rule in the Management of Public Finances of the 1st Petitioner and that the Petition does not raise any Constitutional issues on violation of Constitutional rights.

ANALYSIS AND DETERMINATION

21. Upon consideration of the Petition, the responses to the Petition, the parties rival submissions, I find that the following issues arise for consideration:-

- a) *Whether the Court sitting as a Constitutional Court can issue orders staying the satisfaction of a Judgment and decree issued from the Civil Division of the Same Court.*
- b) *Whether the Respondents can attach the asset belonging to the 1st Respondent as a means of recovering their debt.*
- c) *Whether the Attorney-General is a proper party to this suit.*
- d) *Whether the Court can issue orders staying, suspending or having the effect of moratorium on decisions issued by other Divisions of the High Court.*
- e) *Whether the Petitioners deliberate failure to fully satisfy the decretal amounts owing to the 1st Respondent arising from HCCC 493 of 1991 violate, threaten, infringe and breach the 1st Respondent's rights to access to justice, right to property, right to fair administrative action and right to equal protection and benefit of the law.*
- f) *What reliefs ought to be granted in respect of the Petition and in respect of the Cross-Petition.*

A. WHETHER THE COURT SITTING AS A CONSTITUTIONAL COURT CAN ISSUE ORDERS STAYING THE SATISFACTION OF A JUDGMENT AND DECREE ISSUED FROM THE CIVIL DIVISION OF THE SAME COURT.

22. In order to effectively determine the 1st issue herein it is important to consider the jurisdiction of various divisions within the High Court. It is trite that one division of the High Court cannot stay, suspend or issue moratorium staying the decree, judgment or orders of other divisions of the High Court as both are of the same status. It is trite that the Court sitting as a Constitutional Division, does not have powers to stay, suspend, hear, review, sit in appeal or issue or direct to be issued moratorium stopping, Judgment and decision issued by Civil Division of the High Court.

23. It should also be appreciated that a Judge of Constitutional Division cannot issue orders to stay, suspend, or issue orders / moratorium staying the decree, judgment or orders issued by a Judge of other Division of the High Court.

24. *Article 165(6) of the Constitution* is clear that the High Court does not have supervisory jurisdiction over a Superior Court. It is clearly stated under *Article 165(6) of the Constitution* thus:-

“The High Court has supervisory jurisdiction over subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a Superior Court.” (Emphasis mine)

25. In the instant Petition and notwithstanding clear binding Constitutional dictate, the petition herein in prayers (a) (b) and (e) of their Petition have sought prayers from the Honourable Court that:-

“a) Allow the Nairobi City County, through the Governor, to issue a moratorium staying all payments by the County to its creditors (including the 1st Respondent who is judgment creditor in HCCC 493 of 1991)

b) Direct the 2nd Petitioner, the Governor, to issue a moratorium staying all patens by the Country to its Creditors, (including the 1st Respondent who is judgment creditor in HCC 493 of 1991) for a period of 6 to 12 months.

c) Issue an order that all pending executions against Nairobi City County, specifically those arising out of claims filed against the defunct City Council of Nairobi and those filed against the previous administration of Nairobi City County be forthwith suspended for a period not exceeding 6 months.

26. The Interested Parties and Respondents in support of their proposition that a Constitutional Division cannot issue orders suspending orders issued by other divisions of the High Court placed reliance in the decision of Justice Mumbi Ngugi in ***Robert Mwangi vs. Shepherd Catering Limited & Another [2012] eKLR*** stated as follows:-

“...the Constitutional and Human Rights Division of the High Court is just an administrative Division of the High Court, with the same powers and jurisdiction as all the other Divisions of the High Court....

A Judge sitting in the Constitutional and Human Rights Division has the same jurisdiction as any other judge sitting in any other Division of the High Court. To ask such a judge to adjudicate in a matter that is before another Judge of the High Court is to ask the Judge to act in a matter that he or she has no jurisdiction over, and for the Judge to do that is to engage in a nullity. As Justice Nyarangi so succinctly put it in The Owners of the Motor Vessel “Lilians” vs. Caltex Oil Kenya Ltd [1989]KLR.”

27. I note that the prayers (a) (b) and (c) of the Petition herein relate to the 1st Respondent's decree in ***HCCC 493 of 1991***, which I find to be clearly against the law and are an abuse of Court process, as they seek a Division of the High Court to stay, suspend or issue a moratorium against the decision of another Division of the same Court.

28. Further I note that it is indisputable that the Petitioners in paragraph 8 of the Affidavit of Gideon Mike Mbuvi Sonko and annexures GMMS1A, 1B, and 1C, which constitutes the bulk of the annexures, have placed before the Court judgments, decrees and orders of other Divisions of the High Court, which the Petitioners ask this Court to stay or issue moratoriums. The Petitioners are thereby asking this Court

to act in matter where the Court has no jurisdiction and to engage in nullity, and as such I find the the Honourable Court ought to reject these attempts. I find that the proper and legal way for the Petitioners to stay the said judgments and decrees of the Court is to apply for stay in the respective suits or on appeal, and not to move this Court to stay/suspend the compliance with Court decrees.

29. It is instructive that issues of appeal, stay of decree or review of a judgment or any other decision of the Court is properly provided for under **Orders 42, 43 and 45 of the Civil Procedure Rules, 2010** and also under **Part VIII and IX of the Civil Procedure Rules**, all of which the petitioners have not adopted.

30. There is no doubt, that as it relates to Court Decrees and Judgments, which have not been complied with, is an affront to the rule of law, the dignity of the Court and is clearly an abuse of Court process. I am of strong view that Courts decrees and Judgments cannot be stayed, suspended or moratorium issued over them by members of the executive. To allow that to happen would be against the rule of law and would erode judicial authority.

31. The Court of Appeal has settled this issue and proceeded to state that the High Court Constitutional Division or any other Division cannot supervise any other Superior Court of concurrent jurisdiction. This proposition was even enunciated in the case of **Peter Ng'ang'a Muiruri vs. Credit Bank Ltd & Another, Civil Appeal No. 203 of 2006** where it was stated:-

“The High Court’s Constitutional Division or indeed any other Division cannot supervise any other Superior Court of concurrent jurisdiction... It is an abuse of the Court process for a litigant to seek to obtain through a Constitutional Petition or indeed any other Court process through the same Court or a Court of concurrent jurisdiction a different decision from one already rendered by the Court in the other proceedings over the same matter. The aggrieved party must be content with the devices of appeal or review of the decision already delivered by the Court...”

32. In view of the Constitutional provisions and authorities relied upon, I find therefore that there is no doubt that under **Article 165(6) of the Constitution**, and the myriads of precedents of the Court, that the Petitioners prayers (a), (b) and (e) as they relate to the 1st Respondent claim under the decree issued in **HCCC 493 of 1991** cannot be issued as this Court lacks the power, mandate, jurisdiction and/or authority to issue orders staying, reviewing or suspending the decision of the Civil Division of the same Court.

B. WHETHER THE RESPONDENTS CAN ATTACH THE ASSET BELONGING TO THE 1ST RESPONDENT AS A MEANS OF RECOVERING THEIR DEBT.

33. The Petitioners regarding the above issue contend that **Article 189 of the Constitution** provides that Government at either level shall perform its functions and exercise its powers in a manner that respects the functional and institutional integrity of government at the other level and, in the case of County Government, within the County level. In addition that **Section 7 of the 6th Schedule** states that all laws in force immediately before the effective date continue in force and shall be construed with the alterations, adaptations, qualifications and ex exceptions necessary to bring into conformity with Constitution.

34. It therefore follows that while reading **Section 21 (4) of the Government Proceedings Act** one ought to read the word government to include County Government. It should also be noted that a successful litigant cannot attach the property belonging to the County Government.

35. I now turn to consider the issues raised by the Petitioners as to whether execution and similar process can issue against the 1st Petitioner in prayer (c). The 1st Petitioner being a Government, as defined under **Article 6 (1) and 2 of the Constitution** read together with the First Schedule and recognised as such under **Section 21 of the Government Proceedings Act**, it is clear that no execution or attachment, or any proceedings of such nature can issue against the Petitioners.

36. On the issue on declaration sought in prayer (d) of the Petition on the issue of being committed to civil jail due to contractual obligations, such issue has been heard and determined in several cases, including case of **Beatrice Wanjiku & another v. Attorney General & another [2012] eKLR**, and **Charles Lutta Kasamani vs. Concord Insurance Co. Ltd & Deputy Registrar Milimani High Court Commercial and Admiralty Division [2018] eKLR** among other cases, where the Courts have refused to declare committal to civil jail illegal or unconstitutional. In the **Beatrice Wanjiku Case**, Justice Majanja affirmed that:-

“...the use of arrest and committal may be useful against a recalcitrant judgment-debtor.”

37. It is additionally noted that prayer (d) does not raise any real dispute, as there is no dispute before the Court of any officer of the Petitioners committed to civil jail for failure of Nairobi City County to meet its contractual obligations. It is trite that the Court can only deal with real dispute or controversies before it. I find that this Constitutional Division cannot grant prayer (d) as it would clearly be shackling Courts of similar status and jurisdictions, by granting orders affecting matters before other Courts. If the issue of arrest and committal to civil jail arises, the best Court to deal with the issue is the Court seized of the matter, which would be aware of the peculiar circumstances under which such orders were issued.

C. WHETHER THE ATTORNEY-GENERAL IS A PROPER PARTY TO THIS SUIT.

38. The Attorney General contention is that he has been improperly joined in the instant Petition, and calls upon the Honourable Court to strike out its name from the Petition under **Rule 5(d) (i) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, which provides:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may

appear just order that the name of any party improperly joined, be struck out.”

39. The Petitioners have not responded or made any submission in respect of the issue herein above and in determining the same, I shall be guided by Constitutional provisions and relevant law.

40. The Attorney General, in law, represents the National Government in Court in the following instances, which are inapplicable, in the current Petition:-

“a) Where the National Government is a party to the legal proceedings other than legal as decreed under Article 156(4)(b) of the Constitution.

b) On behalf of the County Government upon request under Section 43 of the county Government Act.”

41. In the instant Petition and upon perusal of the same it turns out that the National Government or any of its organs, departments or authority is not a party to the Petition. Similarly, there is no request by the Petitioners to be represented by the Honourable Attorney General in this Petition, as it is indisputable that the Petitioners have appointed a private law firm to act in the matter. As result, the Honourable Attorney General has no instructions from either the National or Nairobi City county Government or their agencies to act in this matter and is thus mis-joined in the Petition.

42. It is clear that the Interested Party also calls upon the Court to take judicial notice of the fact that 1st Petitioner’s County Assembly has enacted the Nairobi City County Officer of the County - Attorney Act, which creates the Office of the County - Attorney, whose functions among others is stated under **Section 7(c)** thus:-

“The County Attorney shall represent the County Executive in Court or in any other legal proceedings to which the County Executive is a party, other than criminal proceedings.”

43. Upon consideration of the instant Petition it is clear that none of the reliefs sought in the Petition are against the Honourable Attorney - General, and thus, the Honourable Attorney - General has no public interest to champion in the Petition. This is further demonstrated by the fact the Petition, as filed, did not have any Respondents, no organ or agency of the National Government has so far been joined in the suit.

44. In view of the above findings, I find that the Attorney General is not a necessary party and no reliefs are sought against the Attorney - General and as such, the keeping of the Attorney General in this Petition adds no value to the Petition but is a mere waste of Court’s and Attorney Generals valuable time. The order that commends itself in the circumstances is for the name of the Attorney General to be struck off from the instant Petition with costs.

D. WHETHER THE COURT CAN ISSUE ORDERS STAYING, SUSPENDING OR HAVING THE EFFECT OF MORATORIUM ON DECISIONS ISSUED BY OTHER DIVISIONS OF THE HIGH COURT.

45. The Petitioners aver that the function of the County Governor are provided for at **Section 30 of County Government’s Act No. 17 of 2012** and in particular **Section 30(3) (f) of the Act** provides that in performing its functions, the Governor shall be accountable for the management of the use of the County resources. The provisions of the same Act at **Section 31(d)** states that the Governor shall have such powers as maybe necessary for the execution of the duties of the office of the Governor.

46. It is Petitioners contention that the powers of the Governor to issue a moratorium to stay of payment of the debts that were accrued by the defunct City Council of Nairobi is not limited. It is further urged that the Petitioners are not challenging the decretal sums in favour of the various decree holders but are seeking more time to have the debts scrutinised and verified as to achieve prudent use of county resources. The moratorium being sought by the Petitioners is to enable the 1st Petitioner to scrutinize and validate the existing debts.

47. The Petitioners further contend that under **Section 23 of the Public Finance Management Act** mandates a County Assembly to submit a statement setting out a medium term debt management strategy of the County Government with regard to its actual and potential liability in respect of loans and its plans for dealing with those liabilities. Thus the County has caused publication of the Medium Term Management Strategy at page 6 of the document on Suppliers of goods and services, the County seeks to verify existing debts.

48. It is on the above basis that the Petitioners are seeking the various prayers to enable them to verify the status of the pending debts.

49. This Court would like on the onset to reiterate that a person against whom a Judgment, Order, Decree or other decision is issued against by a Court of competent jurisdiction has a duty to comply with same, unless and until such a Court Order, Judgment, or decree is stayed, set aside, discharged or varied. It is further of great importance to emphasise that consistent obedience to Court orders is required, and parties should not take it upon themselves to decide on their own which Court orders are to be obeyed and which ones overlooked, in the supposition that this oversight will not impede the process of justice.

50. In addition justice demands obedience of Courts orders, decisions and decrees. It is imperative where the persons against whom the orders, decrees or decisions are issued against are aware of the same, be they natural persons, governmental authorities or bodies, corporate bodies or any other person. Failure to comply with Court orders, decisions and decrees is deemed contempt of Court, and the Court to protect and preserve the rule of law, is under an obligation not to countenance such contempt.

51. In the instant Petition there is no dispute, that the Petitioners are aware of the Decree of the High Court in HCCC No. 493 of 1991, which they have attached to their pleadings. The Petitioners have not made any application to stay, set aside or discharge the decree, or filed

any appeal in the Court of Appeal to challenge the same. Further, the petitioners have calculated the amounts due under the decree and by letters have confirmed the amount due. Despite all these, the Petitioners have refused, ignored and neglected to pay or fully satisfy the decretal sums.

52. I have no doubt in stating that the failure and/or neglect by the Petitioners to satisfy the decretal sums arising from the Judgment and decree of the High Court in **HCCC No. 493 of 1991** is a deliberate disregard and disobedience of Court Judgment and Decree. The failure of the Petitioners to comply with the decree of the High Court in **HCCC No. 493 of 1991** is violation of **Article 10 of the Constitution**, which binds the Petitioners and all state organs and state officers to the national value and principle of the rule of law.

53. In addition to the aforesaid it is a matter of law that the decision of the High Court Constitutional & Human Rights Division cannot stay, suspend or issue orders/moratorium staying the decree, judgment or orders of other Divisions of the High Court, as both are of the same status. In addition a Judge of this Division, thus the Constitutional Division cannot issue orders to stay, suspend or issue orders/moratorium staying the decree, judgment or orders issued by Judges of other Divisions of the High Court.

54. In view of the above I find that this Court, cannot issue orders staying, suspending or having the effect of moratorium on decisions issued by other Divisions of the High Court as sought by the Petitioners herein.

E. WHETHER THE PETITIONERS DELIBERATE FAILURE TO FULLY SATISFY THE DECRETAL AMOUNTS OWING TO THE 1ST RESPONDENT ARISING FROM HCCC 493 OF 1991 VIOLATE, THREATEN, INFRINGE AND BREACH THE 1ST RESPONDENT'S RIGHTS TO ACCESS TO JUSTICE, RIGHT TO PROPERTY, RIGHT TO FAIR ADMINISTRATIVE ACTION AND RIGHT TO EQUAL PROTECTION AND BENEFIT OF THE LAW.

55. The 1st Respondent in taking up issue with the Petitioners' conduct and failure to settle the decretal amount. It is contended, that through Petitioners failure to fully satisfy the 1st Respondents' decretal amount arising from the Judgment and decree of the Court in **HCCC 493 of 1991** of which they have knowledge, and the Petitioners purport to review, either by themselves or by their appointed Committee on pending bills, to determine whether to pay or settle the same is in violation of the national value and principle of the rule of law under **Article 10 the Constitution** and amounts to thwarting or placing roadblocks on the 1st Respondent right to enjoy the fruits of its judgment, as the petitioners have no power to decide, whether to comply with a Court order, Judgment or Decree.

56. The petitioners purported acts of subjecting the Decree of the High Court issued in **HCCC 493 of 1991** to scrutiny or review is a decoy, manoeuvre and tactic primarily designed to violate the 1st Respondent's right to access to justice.

57. It is 1st Respondent's contention that the Petitioners complained of acts, which acts frustrate, thwart, delay or impede the 1st Respondent from enjoying the fruits of its judgment, after the 1st Petitioner, having unjustly and fraudulently obtained money from the 1st Respondent, is a grievous violation of the Applicant's right to access to justice as protected and enshrined under **Article 48 of the Constitution**.

58. Reliance of the above proposition is placed in Judgment by Justice Majanja in **Republic vs. Town Clerk of Webuye County Council & another [2014] eKLR** where the position was confirmed thus:-

"...a decree holder's right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values of the Constitution particularised under Article 10, the obligation of the Court to do justice to the parties and to do so without delay under Article 159(2)(a)(b) and the Applicant's right of access to justice protected under Article 48 of the Constitution."

59. Similarly Justice G. V. Odunga, in **Republic s. Attorney General & 2 others Ex-parte Mwikali Muindi Katunga & another [2014] eKLR**, issued orders compelling the Respondents to comply with the decree of the Court, confirmed that the Right to Access Justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by Courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers.

60. On prejudice that the 1st Respondent faces reliance is placed in the case of **Republic vs. Attorney General & 2 others Ex-parte Mwikali Muindi Katunga & another [2014] eKLR**, where it was stated:-

"...in the present case the ex parte applicant has no other option of realising the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgments that he has been awarded is realised. Unless something is done he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provision of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by Courts of competent jurisdiction cannot enjoy the fruits of their judgment due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic Society." (Emphasis added)

61. The Petitioners acts of denying the 1st Respondent access to the fruits of its judgment, is demonstrated by the fact that whenever, the 1st Respondent has made a demand for payment and to enforce the judgment, the 1st Petitioner promises to pay and makes token payments as evidenced in the annexures pages 137-140 of the Affidavit in support of the Petition. The 1st Respondent believing the Petitioners, being the Government, do not lie, has refrained from enforcing the same, only to find that the petitioners intend to set up a committee to review among

others, its Court decree, and the Petitioners secretly approached this Court to assist them in doing so. The petitioners, by their acts and promise to satisfy the Decree, which promise the 1st Respondent has relied on to its detriment, are estopped from challenging the decree.

62. I find, that it has been clearly demonstrated by the 1st Respondent that the Petitioners refusal to satisfy the decree and purporting to review the same either themselves or by the agents, is an unmitigated violation of the 1st Respondent's rights to access to justice, and which gives this Court justification to intervene so that the Petitioners can comply with the decree issued in **HCCC No. 493 of 1991** and by issuing the appropriate reliefs.

63. It is contended by the 1st Respondent that the Petitioners' wilful omission, failure and refusal to satisfy the 1st Respondents decretal sums decreed in **HCCC No. 493 of 1991** which prejudicially affects the 1st Respondents rights as decree holder amount to Administrative Action, which **Article 47 of the Constitution** and **Section 2 of the Fair Administrative Action Acts**, defines to mean: **"any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates."**

64. There is no dispute in this matter that the Petitioners inordinate, in-expeditious, and inefficient refusal to fully satisfy the decree issued in favour of the 1st Respondent, while admitting knowledge of the Decree violates the 1st Respondent's right to fair Administrative action under **Article 47 of the Constitution**, that is expeditious and efficient, especially as the 1st Respondent's decretal sum is among the oldest debts the Petitioners have in their books. In addition the Petitioners acts of purporting to form a Committee to subject the 1st Respondent's decree to scrutiny and thereafter make a recommendation on whether to pay/settle or not violate the 1st Respondent's right to fair administrative action, that is lawful under **Article 47(1) of the Constitution**, as these acts are decidedly illegal, ultra-vires, and unlawful, as the Petitioners or their Committee have no power, authority or mandate to review, scrutinize and determine whether to comply with High Court Decree, Judgment of other decision.

65. Additionally the Petitioners acts of purporting to subject the 1st Respondent's decree to scrutiny of Committee, who would then recommend settlement or not is procedurally unfair, and is violation of the 1st Respondent's right to fair administrative action that is procedurally fair as protected under **Article 47 of the Constitution**.

66. I find and note that there is no procedure known in law of subjecting the decree of the High Court to scrutiny of an inferior committee, and purporting to subject the 1st Respondent to this procedure is unfair and unjust.

67. All parties in this matter are bound by clear and unequivocal provisions of the law. The Petitioners are obligated in law to comply with the High Court decree issued in **HCCC No. 493 of 1991**, or where they challenge the decree, to seek to discharge, vary, stay or set it aside, before the same Court or the Court of Appeal, which they have not done. It is ridiculous for the Petitioners, to purport to subject the 1st Respondent, a decree holder, to any other procedure, that is unknown in law and failing to make payments due to the 1st Respondent.

68. The 1st Respondent right to property has been violated by the Petitioners acts of obtaining money from the 1st Respondent fraudulently under the purport of an auction for rate recovery and then failure to transfer the property to the 1st Respondent or to refund the amounts they obtained, even after the judgment and decree of the High Court in **HCCC 493 of 1991** which I find is a violation, infringement and breach of the 1st Respondent right to property.

69. **Article 260 of the Constitution** defines **"property"** to include **"any vested and contingent right to, or interest in or arising from (d) money..."** I find no dispute arises from the decree in HCC 493 of 1991 that it is a monetary decree, which vests on the 1st Respondent a pecuniary right, and that the decree also arise from the Petitioners acts of obtaining money in cash from the 1st Respondent. The refusal to refund the money had and obtained by the Petitioners from the 1st Respondent by fraud, even upon Judgment and Decree of the Court in **HCCC 493 of 1991**, is an arbitrary deprivation of property, and is in violation of **Article 40(3) of the Constitution**.

70. I find in view of the aforesaid that it has been demonstrated that the 1st Respondent right to property was violated, threatened, or infringed by the Petitioners herein.

F. WHAT RELIEFS OUGHT TO BE GRANTED IN RESPECT OF THE PETITION AND IN RESPECT OF THE CROSS-PETITION.

71. The Petitioners prayers are that this Honourable Court do grant the orders sought in the Petition to enable Petitioners postpone payment to its creditors pending the auditing of the various debts.

72. The 1st Respondent is opposed to the Petition and prays that the Petition be dismissed with costs. The Attorney General, the Interested Party herein pray for name of the Attorney General to be struck out and Petition be dismissed with costs.

73. I have carefully considered the Petition and I find, first and foremost, that the Petition does not disclose any violation, breach, infringement or threat to the provisions of the Constitution or the violation of the Petitioners rights and fundamental freedoms, therefore the Petition does not raise a Constitutional question. On perusal of the Petition further it reveals that the Petition merely seeks to answer a question whether the Petitioners can issue a stay/moratorium under **Articles 201 (d) and (e) and 207 (2) of the Constitution** and **Sections 31(d) and 30(3)(f) of the County Government Act** (see prayer (a) and (b) of the Petition). Further it is noted the key question the Petitioners seek to answer is whether they can issue moratoriums at all, including whether such moratoriums can be issued over Court decisions. In view whereof it is clear in my mind that the best course of action would be to seek an advisory opinion from the Supreme Court under **Article 163(6) of the Constitution**.

74. The reliefs sought herein by the Petitioners in the nutshell are not obtainable against the 1st Respondent, by Petitioners who are in contempt of Court orders, and who I find are prohibited from making application seeking orders or reliefs before this Court, before complying with the Court's decision in **HCCC 493 of 1991** regarding prayers (a) and (e) of the Petition. I find the same cannot be issued by this Court in respect of the 1st Respondent's decretal sum arising out of the Judgment and decree of the Court in **HCCC No. 493 of 1991**, as this would amount to the Constitutional Division of the High Court staying, reviewing, suspending or supervising the orders of the Civil Division of the High Court.

75. As regards prayer (c) of the Petition, I find that the same is moot, as under **Section 21 (4) and (5) of the Government Proceedings Act**, no execution or attachment or process in the nature thereof can be issued against the County Government.

76. On prayer (d) of the Petition, I find the same to be baseless considering that no person can be arrested and put in a civil jail on the basis of a contract but only by all order of the Court, and the Petitioners knowing that this Court cannot supervise other superior Courts, wishes by this prayer, to put different divisions of the same Court against each other.

77. I further in view of the pleadings herein, and the conclusion that I have come to, find and hold, that the orders sought in the Petition cannot be issued against the 1st Respondent, following the Petitioners' admission and knowledge of the Court's Decree in **HCCC 493 of 1991**, and their proceeding on to calculated the sums due, the Petitioners in bad faith and without notice to the 1st Respondent, instituted the Petition clandestinely.

78. Further in paragraph 48 of the Petition and in prayer (e) of the Petition, the Petitioners sought only 6 months from 12th January, 2018 to enable it comply with the decision of the Court, which time has lapsed without the Petitioners settling the 1st Respondent's decretal amounts. The Petitioners therefore merely wish to use the Petition to further cause injustice, harm and grave prejudice to the 1st Respondent.

79. The upshot is that the Petitioners Petition is without merits and is for dismissal.

80. The 1st Respondent in seeking granting of the Cross-Petition urges that the Petitioners are insulated from execution and proceedings in the nature of executions under **Section 21(5) of the Government Proceedings Act**. The 1st Respondent urges it stands to be gravely prejudiced unless the Court intervenes by granting the reliefs sought in the Cross Petition. The 1st Respondent urge further that the Petitioners have demonstrated that they will not fully satisfy the amounts decreed by the Honourable Court, to the grave detriment, prejudice and injustice to the 1st Respondent herein. It is further averred that if Court does not grant the reliefs sought in the Cross-Petition, the Petitioners would not only have defrauded the 1st Respondent of its money in cash but also thwarted, impended and defeated the 1st Respondent is judicial decreed rights.

81. The 1st Respondent further urge that if the Court does not grant the reliefs and prayers sought in the Cross-Petition, the 1st Respondent will continue to be gravely aggrieved by the deliberate acts of the Petitioners, which acts are clearly an affront to the rule of the law and a disrespect and disregard of judicial authority and that the administration of justice is likely to be brought to disrepute, and the shred the Confidence of the public on the ability of the Court to ensure compliance with its orders and the rule of law.

82. In view of the conclusion that I have come to herein above, I find no merits in the Petitioners' Petition. The same is dismissed. I further make the following orders:-

a) The 1st Interested Party, the Honourable Attorney – General, is not a proper party and the name of the Attorney – General is struck off from the instant Petition.

b) A Constitutional Division cannot issue orders staying, suspending or having the effect of moratorium over decisions issued by other Divisions of the High Court.

c) The 1st Respondents Cross-Petition is meritorious as the Petitioners are obligated to comply with the Courts' Orders as issued in HCCC 493 of 1991; the 1st Respondent is at liberty to make appropriate application for execution before the High Court in HCCC 493 of 1991.

d) Costs of the Petition and Cross Petition awarded to the 1st Respondent and 1st Interested Party.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF NOVEMBER, 2021.

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J. A. MAKAU

JUDGE OF THE HIGH COURT OF KENYA