REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 443 OF 2017

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW SEEKING FOR ORDER OF MANDAMUS BY SAMUEL E.N. MWERU & 5 OTHERS

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER OF MANDAMUS BY WAY OF JUDICIAL REVIEW

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

NAIROBI CITY WATER AND SEWARAGE COMPANY LIMITED....2ND RESPONDENT

NAIROBI CITY COUNTY.....3RDRESPONDENT

AND

SAMUEL M. N. MWERU

MWANGI MWERU

JAMES KARANJA

PETER KARIUKI

DANIEL NGANGA

SIMON THUKU.....EX-PARTE APPLICANTS

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th July, 2017, the applicants herein seek the following orders:

> **1. That an order of mandamus by way of judicial review do issue compelling the respondents by themselves and or by their agents to pay the applicant an aggregate sum of Kshs 3,448,234.16 as decreed by a decree of the High Court dated 16th March 2010 in HCCA 42 of 1989;**

2. That an order of mandamus by way of Judicial review do issue compelling the respondents by themselves and or by their agents to pay the applicants the decretal amount together with interest at Court rates and pursuant Section 117 of the Land Act as from 1989 until payment in full;

3. That the costs of this application be provided for.

Applicants' Case

2. According to the applicants, sometimes in 1989 the Commissioner of Lands instituted the process of land acquisition within the Ndakaini area for purposes of construction of the Ndakaini dam which was to provide water to the City of Nairobi and its environs through the 2nd respondent. Pursuant thereto, the Commissioner of Lands came up with a compensation scheme and the applicants herein appealed the same vide HCC No. 42 of 1989-Nairobi - **Mwangi Mweru & 5 Others vs. The Commissioner of Lands**, which appeal was determined and a decree issued on 16th March 2010 in which the Commissioner of Lands was ordered to pay the applicants Kshs 3,448,234.16.

3. According to the applicants, section 7 of the ***Land Acquisition Act*** Cap 295 in force then and currently section 111(1) of the ***Land Act*** provides that if land is acquired compulsorily thereunder, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined. However, the respondent had never paid the compensation by August when the Constitution was promulgated and the office of the Commissioner of Lands ceased to exist and its functions taken over by the 1st respondent.

4. According to the applicants, the 1st respondent indicated that the County Government of the City of Nairobi had the responsibility of paying the decretal amount and when the applicants contacted the County Government they relegated the responsibility of payments to the 2nd respondent. The applicants contended that despite engaging the 2nd respondent and holding numerous meetings, demands and follow-ups the respondents have refused and/or declined to settle the amount.

5. It was however disclosed that by letter of 30th January 2017, the 2nd respondent admitted that the amount payable to the applicants was Kshs 27,431,391.89 but have not paid the same. According to the decree, it was averred, the respondents by themselves and or by their agents were directed to pay the applicants an aggregate sum of Kshs 3,448,234.16. which sum the respondents have without any justifiable reason refused to settle.

6. The applicants deposed that section 16 of the ***Land Acquisition Act*** Cap 295 in force then and now section 117(1) of the ***Land Act*** provides that if the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest of the amount awarded at the base lending rate set by the Central Bank of Kenya and prevailing at that time from the time of taking possession until the time of payment. It was therefore averred that the respondents having taken possession before compensating the applicants pursuant to section 125 of the ***Land Act*** No. 6 of 2012 they should be compelled to pay interest on the decretal amount at both court rates and statutory rates since the refusal to pay has no legal justification and infringes on the applicants' constitutional rights of compulsory acquisition of property and compensation and the right to fair administrative action.

7. It was disclosed that since the applicants had issued the respondents with a demand and notice of their intention to file these proceedings but they had not responded, they should therefore be compelled to pay and settle this long outstanding matter.

8. According to the applicants, they had engaged the respondents on the settlement of the claim but recently noted from the media that the employees of the 2nd respondent who is supposed to pay the amounts owing to them were striking ostensibly because the respondent is due to be sold to a private individual.

1st Respondent's Case

9. The 1st Respondent, on its part averred that it is an independent commission established under Article 67(1) of the Constitution and is operationalized by the ***National Land Commission Act*** No. 5 of 2012, and has as its fundamental functions, the management of public land on behalf of the National and County Governments in accordance with the principles of land ownership espoused in the constitution.

10. It was averred that following promulgation of the current Constitution in 2010 and following enactment of the new land laws, the 1st respondent took over the overall responsibility of land management in the country and that the ***National Land Commission Act*** provides under section 30(b) that any function or transaction, civil proceedings or any other legal or other process in respect of any matter carried out in relation to the administration of public land administration by or on behalf of the Ministry of lands before the commencement of the Act shall be deemed to have been carried out under the Act. Therefore any functions previously performed by the Commissioner of Lands are now done by the National Land Commission.

11. The 1st Respondent averred that its mandate was to acquire land on behalf of the 3rd respondent in accordance with the provisions section 107(1) of the ***Land Act, 2012*** and that section 111(1)(a) of the ***Land Act, 2012*** provides that the acquiring body shall deposit with the 1st respondent the compensation funds in addition to survey fees, registration fees and any other fees before acquisition. It was its case that given the above statutory provision, any delays regarding compensation are not occasioned by the 1st respondent hence the application as against it has no merit and should therefore be dismissed as against it with costs.

2nd Respondent's Case

12. The 2nd Respondent opposed the application.

13. According to it, it is a private company and ought to be excluded from the purview of the orders sought which are ordinarily directed to public bodies. It however admitted that it was aware that this matter arise for, a decree of the court issued on the 18th March, 2010 which was principally against the Commissioner of Lands arising out of a consent judgement but with no interest hence seeking to enforce it against the 2nd respondent is unjust.

14. It was the 2nd respondent's case that the issue of the compensation to the applicants as clearly demonstrated in the annexures to the verifying affidavit was ably addressed by the 3rd respondent from the correspondence exchanged between the parties and that the applicants were paid the sum of Kshs 2,637,522.00 from the amounts as ordered in the decree. It was therefore the 2nd Respondent's position that the applicants' claim that the responsibility to pay their claims was delegated to the 2nd respondent is not borne out any legal or contractual grounding and the case should be directed to the right parties since in its view, it was not a party to the Court case leading to the decree ad there is nothing exhibited by the applicants to warrant the 2nd respondent's involvement in this case.

15. The 2nd Respondent's case was therefore that the applicants' claim is unfounded in so far as it seeks to enforce the whole decree as issued by court. According to it, the applicants' plea that the 2nd respondent is about to be sold to private hand is speculative and not based on any plausible evidence and should be disregarded.

16. It was therefore averred that the applicants have not demonstrated grounds that reach the threshold upon which this Court can be moved to issue the prayers sought.

3rd Respondent's Case.

17. The application was similarly opposed by the 3rd Respondent and in so doing filed the following grounds of opposition:

> **1. That the applicant is frivolous, vexatious and an abuse of the court process and is a mere publicity stunt by the applicants as it does not relate to the 3rd respondent**
>
> **2. That the said decree issued on 10th March 2010 is neither against the 3rd respondent nor was the 3rd respondent a party to the proceedings being Appeal No. 42 of 1989. The orders sought cannot in law lie against the 3rd respondent hence the 3rd respondent ought not be a party to this suit.**
>
> **3. That the orders sought by the applicant do not lie as against the 3rd respondent as there is no statutory duty imposed upon to act as demanded. The applicants have not stated under which law the cited 3rd respondent has to act as demanded.**
>
> **4. That it is in the interest of justice and fairness that the instant application be dismissed with costs to the applicant as it is fatally incompetent incurably defective, vexatious and an abuse of the court process.**

Applicant's Rejoinder

18. In his rejoinder, the applicant averred that the 1st and 2nd respondents are public bodies and pursuant to section 107(1) the Commission acquires land for and on behalf of other bodies and in this case according to the records that exist the applicants properties were acquired for and on behalf of the 2nd and 3rd respondents and therefore correctly enjoined in the matter as a respondent.

19. It was averred that a public body has been defined as the (a) the Government; or (b) any authority, board, commission or other body which has or performs, whether permanently or temporarily, functions of a public nature, or which engages or is about to engage in the exploitation of natural resources or the provision of power or any other activity which is of benefit to the public. In this case, the 2nd respondent though private in nature engages in exploitation of a natural resource and distributes water for the benefit of the public. Further the company is the one in direct control of the Ndakaini Dam where the land in issue was compulsory acquired.

20. According to the applicant, in its letter 30th January 2017 the company Secretary of the 2nd respondent tabulated the amounts owed to the applicants and therein factored the issue of interest and it is therefore in bad faith for a legal officer working under her to turn around and claim that the applicants are not entitled to interest. Furthermore section 117 of the ***Land Act 2012*** is very clear that where the compensation is not paid promptly the applicants are entitled to interest.

21. The applicants further denied that they were paid as alleged or at all and I have seen the said payment vouchers for the first time attached to the replying affidavit. To them, the vouchers are not approved, authorized and/or signed by the recipients and therefore they are not sufficient proof the amount was paid. In any case they have been demanding for the compensation since 1989 and at no point has the 2nd respondent brought up the issue of payment if at all the compensation was done. Even when the decree was adopted in 2010 there was no issue payment that was raised. The applicants noted that in the 2nd respondent's letter dated 24th January 2017 in the penultimate paragraph they state they are ready to settle the decretal sum and request for bank account details of the applicants hence it is hypocritical for the 2nd respondent to now aver that we were paid the sum of Kshs. 2,637,522/= in 2004.

22. While acknowledging that the 2nd Respondent was not a party to the initial proceedings in Court, the applicants maintained that the acquisition was being done by the Commissioner of Lands on their behalf hence they are the beneficiaries of the acquisition and derive income from the use of the dam and therefore are entitled to settle the claim.

23. The applicants insisted that pursuant to section 125 of the ***Land Act 2012***, just compensation is supposed to be made prior to taking of

possession. In this case the 2nd respondent is in possession yet they have not compensated the applicants hence they are entitled to pay the decretal amount together with interest.

Determination

24. I have considered the issues raised in this application.

25. Section 21(1) of the ***Government Proceedings Act*** provides:

> **Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:**
>
> **Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant.**

26. Section 21 (3) of the said Act on the other hand provides:

> ***If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***
>
> **Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein.**

27. Dealing with the said provisions **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** expressed herself as follows:

> **"In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (*hereinafter referred to as the Act)* which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. *This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues*."** [Emphasis mine].

28. The effect of grant of an order of *mandamus* was considered *in extenso* in in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** expressed himself, *inter alia*, as follows:

> **"Mandamus is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature… In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an**

interest in the fulfilment of that duty…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…"

29. The Court continued:

"English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile… *It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose*. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government….Whereas *mandamus* may be refused where there is another appropriate remedy, there is no discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament… In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". *The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament*. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…"

30. It was added that:

"*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs." [Emphasis added].

31. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, this Court expressed itself as hereunder:

"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has

been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions 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 judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement 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. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

32. The circumstances under which judicial review order of *mandamus* are issued were set out by the Court of Appeal in **Republic vs. Kenya National Examinations Council *ex parte* Gathenji & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89*** thus:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of *mandamus* compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

33. It is therefore clear that where judgement has been delivered, the person against whom judgement is delivered is under a legal obligation to satisfy the same. In this case it is agreed that judgement was issued against the Commissioner for Lands and the 1st Respondent has taken over its rights and liabilities. It follows that the duty to settle the sums decreed to be due and owing from the Commissioner of Lands falls on the 1st Respondent. This issue was dealt with by **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008,** in which the learned Judge cited with approval the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** and held that:

"Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 County Governments are therefore the natural and presumptive legal successors of the defunct local authorities."

34. Majanja, J who delivered the decision in **Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006** pronounced himself on the provisions of section 59 of the ***Urban Areas and Cities Act*** No. 13 of 2011 as read with Section 33 of the Sixth Schedule of the Constitution. The former provides:

Any legal right accrued, cause of action commenced in any court of law or tribunal established under any written law in force or any defence appeal or reference howsoever field by or against any local authority shall continue to be sustained in the same manner in which they were prior to the commencement of this Act against a body established by law.

35. The learned Judge accordingly found that:

"the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgement. The court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic vs. Minister for Land & 2 Others ex parte Kimeo Stores Ltd (2011) eKLR, Kenya National Examination Council vs. Republic exparte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996)."

36. It is true that section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the

Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. Section 33 of the sixth schedule, on the other hand provides:

> **An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.**

37. It follows that the 1st Respondent is under a constitutional and legal obligation to satisfy the liabilities of Commissioner of Lands, whether acquired by design or otherwise. The 1st Respondent however states that its mandate was to acquire land on behalf of the 3rd respondent in accordance with the provisions section 107(1) of the ***Land Act, 2012*** and that section 111(1)(a) of the ***Land Act, 2012*** provides that the acquiring body shall deposit with the 1st respondent the compensation funds in addition to survey fees, registration fees and any other fees before acquisition. It was its case that given the above statutory provision, any delays regarding compensation are not occasioned by the 1st respondent hence the application as against it has no merit and should therefore be dismissed as against it with costs.

38. Section 125 of the ***Land Act, 2012*** however provides as follows:

> **(1) The Commission shall, as soon as is practicable, before taking possession, pay full and just compensation to all persons interested in the land.**
>
> **(2) An acquiring authority shall pay the first offer of compensation to the interested parties before taking possession.**

39. It therefore follows that before the Commission acquires land on behalf of any authority it must ensure that the funds required for the said acquisition are placed at the disposal of the Commission so that as soon as the process is completed but before possession of the land is taken the person interested in the land is fully compensated. Where the Commission fails to do so and the land is possessed by the acquiring authority before payment is made, the obligation to ensure payment is made falls squarely on the Commission. It falls that the Commission cannot escape liability in such circumstances by simply contending that the acquiring authority has not availed the funds.

40. As regards interest, section 117(1) of the ***Land Act*** provides that:

> **If the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest on the amount awarded at the rate prevailing bank rates from the time of taking possession until the time of payment.**

41. The 2nd Respondent however contends that the judgement did not provide for interest. Even if the judgement was by consent, a consent judgement has contractual effect and parties cannot contract outside the express provisions of the law. It follows that the applicants are entitled to interest since there is no satisfactory material on the basis of which this Court can find that any payments were made to the applicants.

Order

42. In the premises I find merit in the Motion dated 25th July, 2017 and I issue an order of *mandamus* compelling the 1st respondent either by itself or through the 2nd and 3rd Respondents to pay the applicant an aggregate sum of Kshs 3,448,234.16 as decreed by the High Court decree dated 16th March 2010 in HCCA 42 of 1989 together with interest at Court rates and pursuant section 117 of the ***Land Act*** as from 1989 until payment in full. The applicants will also have the costs of these proceedings to be borne by the 1st Respondent.

43. It is so ordered.

Dated at Nairobi this 16th day of March, 2018

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Bwire for Mr Kioko for the 2nd Respondent

Miss Savini for Mr Koceyo for the 3rd Respondent

CA Ooko