REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. CIVIL APPLICATION NO. 355 OF 2016

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF MANDAMUS

IN THE MATTER OF SECTION 8 & 9 LAW REFORM ACT 1960; SECTION 20 GOVERNMENT PROCEEDINGS ACT 1956;

AND

IN THE MATTER OF THE ORDERS OF THE HIGH COURT OF KENYA ISSUED IN NAIROBI HIGH COURT CIVIL CASE NO. 876 OF 2004

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE SOLICITOR GENERAL.....2ND RESPONDENT

EX PARTE: ORBIT CHEMICALS LIMITED

RULING

Introduction

1. By a Notice of Motion dated 11th August, 2016, the applicant herein, **Orbit Chemicals Limited**, seeks the following orders:

1. **That this Application be Certified as Urgent and heard *ex-parte* in the first instance.**

2. **That an Order of *Mandamus* be and is hereby issued against the Respondents compelling them to forthwith pay the decretal sum ordered in the Ruling of the Honourable Lady Justice R. Nambuye delivered on 12th October, 2012 in High Court Civil Case No. 876 of 2004, amounting to Kshs. 6,015,113,000.00 with accrued interest with effect from the date of the Judgment till payment in full and costs as agreed between the parties in the Settlement Agreement within fourteen (14) days of this Honourable Court's Orders.**

3. **In default, Notice to show cause do issue against the 2nd Respondent to show cause why he should not be cited for insubordination and contempt of court and he be personally summoned to Court and personally committed to civil jail.**

4. **That this Honourable court do grant such further orders and other consequential orders, writs, declarations and directions as this honourable court may consider appropriate for the purpose of enforcing of the provisions of the Constitution of Kenya.**

5. **That the costs of this application be paid for by the Respondents**

Applicant's Case

2. According to the applicant, it filed a suit against the 1st Respondent in HCCC No: 876 of 2004 on the 11th August, 2004, following the illegal registration of a Registrar's Caveat over its Property L.R. No. 12425, Embakasi, Nairobi, measuring 95.2 acres on the 28th September, 1987 and in its Ruling dated 22nd September, 2006, the High Court **(Justice J.B. Ojwang)** struck out the Defence filed by the 1st Respondent and granted the Applicant all the prayers in its Amended Plaint dated 11th October, 2004 and ordered inter alia for the removal of the Caveat and squatters from L.R. No. 12425 and the delivery of vacant possession of the property to the Applicant. In addition the suit was to be fixed for Formal Proof, on a priority basis.

3. It was averred that the 1st Respondent failed to appeal on time, but later filed an Application in the Court of Appeal, for leave to Appeal out of time which application was withdrawn on the basis that the matter would be settled out of court. Subsequently, on 7th May, 2007, the suit was fixed for formal proof but parties pursued an out of court settlement. It was averred that pursuant thereto, the Ex parte Applicant's lawyers moved the Court on the 24th July, 2008, for a Court Judgment in terms of the Compromise Agreement and following the hearing of the matter in the High Court, the Court gave Judgment on the 12th October, 2012, in favour of Applicant in terms of the Compromise Agreement on the 4th March, 2008. By the said decision judgement as entered in the sum of Kshs. 6,015,113,000/=, together with interest at Court rates (14%) from the 4th March, 2008, until payment in full, as well as costs of the suit as per the Settlement Agreement.

4. In the applicant's view, a court decree is an order of the Court that should be held to the highest regard on account of the rule of law and defying a court order amounts to impunity of the highest level.

5. According to the applicant notwithstanding the fact that the 1st Respondent moved to the Court of Appeal, the mere fact that an appeal has been preferred does not entitle the 1st Respondent to an automatic stay of the Orders issued by the Court. In addition if the 1st Respondent wished to stay the orders it should have made a Stay of Execution Application or sought a stay informally on the day that Judgment was being delivered but neither of these options was resorted to.

6. According to the applicant despite the Respondent's intimation that it was keen in settling the matter, no concrete steps have been taken in that direction. It was therefore the applicant's view that the 1st Respondent through its conduct seeks to spurn the High Court's judgment by asserting lack of authority by its agent and as such it is in the interests of justice that this Court should not allow the Respondents' conduct to be tolerated any longer as it is an abuse of the Court process. To the applicant, the 1st Respondent's Appeal is a further ploy to delay and/or avoid settling the decretal sum, with interest and costs therein. It was asserted that the 'settlement negotiations' have been continuously used a weapon deployed by the Respondents to delay and/or refuse the final settlement of the decretal amount owed to the Applicant which amount as at the 1st August, 2016, inclusive of interest was Kshs. 18,097,992,033/=

7. Based on legal advice, the applicant contended that the 2nd Respondent being the Accounting Officer of the 1st Respondent has a public duty to settle the decretal sum awarded by this honourable Court, which duty he has refused to perform hence where there is a breach of public power/duty, this honourable Court must compel the 2nd Respondent to perform such duty.

8. It was further averred that ultimately, the Respondents have to settle the decretal amount, which interest is continuing to rise astronomically and as such the performance of this duty will ensure that the Public's coffers are saved from further wastage finally putting a stop to the Respondents consistent abuse of the Court's process by employing unnecessary delaying and time wasting tactics, which impact has denied the Applicant it's right to compensation. It was the applicant's position that any further delay in settling the decretal sum will infringe on the principle of fair hearing as enshrined in Article 50 of the Constitution and sections 1A of the ***Civil Procedure Act*** which demands for a just, expeditious, proportionate and affordable resolution of disputes and section 1B of the ***Civil Procedure Act***, ***2010*** which requires a just determination of the proceedings and the timely disposal of the proceedings and all other proceedings in the court at a cost affordable by the respective practices.

9. It was the applicant's case that an Order of *Mandamus* lies where there is no alternative/equally effective remedy or where the mode of redress is less convenient/beneficial/effectual. To it, as it is not legal to institute execution proceedings against the government of Kenya to realize a debt owed, an Order of Mandamus remains the only effective way of accessing justice that was denied when the Respondents declined to satisfy the decretal sum.

1st Respondent's Case

10. In opposition to the application, the 1st Respondent filed the following grounds of opposition:

1. That the neither the Attorney General nor the Solicitor General has the statutory mandate/responsibility to settle decretal sums on behalf of other government offices.

2. That it is apparent from the ex-parte applicant's annextures that the Attorney General was sued on behalf of the Commissioner of Lands and Registrar of Titles and therefore cannot be liable for settling judgments decreed against the said offices.

3. That neither the Attorney General nor the Solicitor General is an accounting officer for the Commissioner of

Lands or the Registrar of Titles.

4. That no leave was obtained to seek prayers 3 and 4 of the prayers sought which in any event are not judicial review orders issuable in the exercise of the High Court's special jurisdiction of judicial review.

5. That the jurisdiction of the High Court invoked in the present proceedings is statutorily conferred and it would be both unconstitutional and ultra vires the Law Reform Act if the same is expanded by judicial craft as proposed by the ex-parte applicants in seeking prayers 3 and 4 of the prayers sought in the motion.

6. That in seeking the relief sought in prayer 3 of its application the ex-parte applicant presupposes that the outcome of its application has been predetermined and if this Honourable court were to grant the same it would be contrary to the 2nd Respondent's rights under Article 50 of the Constitution and would also be taking away the Respondent's right to Appeal as expressly conferred under section 8 (5) of the Law Reform Act.

7. That the prayer sought against the 2nd Respondent is an abuse of the court process to try an intimidate a member of the executive arm of government and if issued would be contrary to the procedural safeguards for fair hearing, contrary to the provisions of the High Court (organization and administration Act) section 36(4) and contrary to the principles of fair administration set out in Article 47 of the Constitution and Fair Administrative Action Act.

8. That the application is bad, is premature and in the circumstances without merit.

2nd Respondent's Case

11. On behalf of the 2nd Respondent a replying affidavit was filed.

12. Apart from reiterating the grounds of opposition by the 1st Respondent, the 2nd Respondent averred that his office had not received any budgetary allocation from the Treasury to settle this claim and therefore it cannot be rightfully said that the office has refused or declined to settle the same as it is common knowledge that Ministries depend on National Treasury allocations for the settlement of decretal amounts.

13. Apart from that it was averred that the provisions of the Government Proceedings Act shields public officers from being held personally liable for any order requiring the government to pay any money arising out of an order of the court.

Determinations

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

15. The first issue for determination is whether the Respondents herein are under a legal duty to satisfy the decree the subject of these proceedings. According to the applicant, the Attorney General is mandated by the Constitution to represent the national government including all government departments in all legal proceedings to which the government is a party save for criminal proceedings and in support of this submission, the applicant relied on Article 156(4) of the Constitution of Kenya, 2010 which states that:

The Attorney-General—

a) is the principal legal adviser to the Government;

b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and

c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.

16. It was therefore submitted that Court jurisprudence has it that when Attorney General is sued on behalf of the government he is obliged to advise his client to pay any costs and liabilities that arise out of his representation failure to which, the duty shall rest on him and in this respect reliance was placed on **Peter Anyang' Nyongo & 10 Others vs. Solicitor General [2011] eKLR,** in which **Warsame J**. expressed himself as follows:

"No doubt the decree is against the Attorney General but in his representative capacity. As stated earlier the Attorney General was representing one arm of the Government and if any costs or liability accrues from his representation, he is obliged to pay the costs. It is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client. Being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf. Clearly, it is the duty and the function of the Attorney General to advise his client and if a particular organ refuse to pay he will be responsible on behalf of his agent. In that regard the Solicitor General being the accounting officer of the Attorney General was rightly sued by applicants. In my mind the applicants clearly and correctly sued the Solicitor General and are entitled to the orders sought."

17. It was therefore the applicant's case that when the Attorney General is sued as a representative of the government as the sole Defendant, he is obliged to pay any liabilities arising out of his representation. Where he feels that he is not the right party to be held liable he should seek to have the right parties enjoined. If he conducts the suit to its conclusion as the sole defendant then he will be duty bound to fulfil his obligations under the decree. In support of this position, the applicant relied on **Republic vs. Attorney General ex parte Kahugu Karebe [2012] eKLR.**

18. I have considered the arguments put forward by the applicant hereinabove. That argument though attractive, it is with due respect not supported by the law in my view. It is true that under Article 156(4) of the Constitution the Attorney-General represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. In **Council of Governors & 6 Others vs. Senate [2015] eKLR**, a three judge bench of the High Court expressed itself as hereunder:

> **"The question we must therefore answer is whether it is mandatory to sue the Attorney General where the conduct of the Senate or its proceedings are in issue…it is clear to us that the Constitution, 2010 allows the Attorney General the right to represent the National Government in Court proceedings but does not stipulate that the Attorney General should be sued in all instances where any organ of the National Government has been sued and to say otherwise would be absurd."**

19. In my view the mere fact that a person has a right to be legally represented by another does not necessarily mean that that other person takes over the liability of the person he represents. To hold to the contrary would in my view be clearly untenable. However section 12(1) of the ***Government Proceedings Act***, provides as hereunder:

> ***Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be.***

20. In my view, this is what is referred to as a "deeming" provision. As was held in **Prof. Peter Anyan'g Nyong'o and 10 Others vs. Attorney General of Kenya & Others EACJ Reference No. 1 of 2006 [2007] 1 EA 5; [2007] 2 EA 5; [2008] 3 KLR (EP) 397**:

> **"The word "deemed" is commonly used both in principal and subsidiary legislation to create what is referred to as *legal or statutory fiction* and the legislature uses the word for the purpose of assuming the existence of a fact that in reality does not exist...The word "deemed" is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction of a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."**

21. In other words for the purposes of institution of civil proceedings, the Attorney General is deemed as the department of Government concerned and any judgement obtained against the Attorney General in such proceedings is deemed as a judgement against the said department. It is in that respect that I understand the holding in **Republic vs. Attorney General ex parte Kahugu Karebe (supra)** that:

> **"Though it is true that the Attorney General had been sued in RMCC 6263/1999 on behalf of the Commissioner of Police, the important point to note is that the Attorney General was the only defendant named in the suit and after full hearing of the applicant's case on the merits, judgment was entered by a court of competent jurisdiction for the plaintiff (now applicant) against the Attorney General (Respondent). That Judgment remains valid and enforceable since there is no evidence that it has been overturned on appeal or set aside. If the Attorney General was of the view that he was not the proper party to be held liable for acts of negligence attributed to the police officer whose negligence caused personal injuries to the Applicant, he ought to have had himself struck out from the suit as the defendant so that in his place the proper party would have been brought on board as the defendant in his place. The fact that this was not done and judgment was eventually entered for the plaintiff against the Attorney General as the defendant means that the final decree was issued against the Attorney General and the Attorney General is duty bound to satisfy that decree."**

22. The question is who is then under a legal obligation to satisfy such a judgement after the same has been given? 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.***

23. 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.

24. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department.

25. The procedure in such matters was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** held, *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…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…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…"

26. The Court continued:

"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…*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."

27. It is therefore clear that in applications for *mandamus* seeking to compel the satisfaction of a decree, it is the accounting officer of the relevant government department that is obliged to satisfy the decree notwithstanding the fact that the said officer was not a party to the trial proceedings and that in fact the only defendant therein was the Attorney General. Therefore whereas I agree with the position in **Peter Anyang' Nyongo & 10 Others vs. Solicitor General [2011] eKLR,** that it is for the Attorney General to advise his clients to pay the costs which attracted his representation on behalf of the said client and that being a constitutional representative and being the principal legal advisor to the three arms of the Government, he is required to direct any arm of Government he represented to pay the costs of any suit which he acted on its behalf; I however do not subscribe to the view that if any costs or liability accrues from his representation, he is obliged to pay the same and that if a particular organ refuses to pay he will be responsible on behalf of his agent.

28. It is however my view that the failure to commence judicial review seeking the orders of mandamus against the accounting officer, though an irregularity, is not fatal. Considering the role of the Attorney General in such proceedings, the same ought not to be determined simply on non-joinder or misjoinder of parties. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for *mandamus* where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

29. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the national Government and not the said officer in his personal capacity.

30. It was contended that no leave was obtained to seek prayers 3 and 4 of the prayers sought which in any event are not judicial review orders issuable in the exercise of the High Court's special jurisdiction of judicial review. In those prayers the applicant sought orders that in default of compliance with the order of *mandamus* a notice do issue against the 2nd Respondent to show cause why he should not be cited for insubordination and contempt of court and be personally summoned to Court and personally committed to civil jail and for such further orders and other consequential orders, writs, declarations and directions as this honourable court may consider appropriate for the purpose of enforcing of the provisions of the Constitution of Kenya.

31. In determining this issue it is important that the Court deals with the current legal provisions dealing with contempt of court against state officers and their offices. Parliament vide Act No. 46 of 2016 enacted the ***Contempt of Court Act***, 2016 which was assented to on 23rd December, 2016 and commenced on 13th January, 2017.

32. According to the said Act contempt includes civil contempt which means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court. Section 30 of the said Act provides that:

1. ***Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***

2. ***No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.***

3. ***A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.***

4. ***If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.***

5. ***Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***

6. ***No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.***

33. It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice period proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit, why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

34. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

35. With respect to the contempt of court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

"…any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution."

36. It follows that the rules of natural justice ought to be adhered to in respect of the proceedings subsequent to the notice to show cause. In this respect it is expected that the application seeking orders to commit for contempt ought to be served personally upon the person sought to be committed. Section 37 of the Act empowers the Chief Justice to make rules for the better carrying out of the purposes of the Act. Before the enactment of the Act, section 5 of the ***Judicature Act*** imported the procedure for contempt of court followed by the High Court of Justice in England. Whereas the said section was deleted by section 38 of the Act, the rules contemplated by section 37 have not yet been promulgated. In my view, in the absence of the rules of procedure the lacuna must be filled by the invocation of section 24 of the ***Interpretation and General Provisions Act*** which provides that:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

37. The procedure existing before the enactment of the ***Contempt of Court Act*** was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court found that under Rule 81.4 of the ***Civil Procedure (Amendment No. 2) Rules***, 2012, which deals with breach of judgement, order or undertaking, the application for contempt is made in the proceedings in which the judgement or order was made or undertaking given by what is referred to as "application notice" which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. In that case, the Court of Appeal held that leave or permission is nolonger required in such proceedings. In our case however, section 30(5) c0mplicates the procedure by stating that the contemnor, in case of a State organ, government department, ministry or corporation ***may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***

38. In my view, to require an applicant to apply for leave to impose a sentence after the Court has been satisfied that a contempt of court has been committed by a State organ, government department, ministry or corporation would negate the provisions of Article 159(2)(d) of the Constitution. It is therefore my view that an applicant for contempt may perfectly apply for leave to fine the contemnor in the same application seeking that the Court finds the Respondent to be in contempt. To that extent the leave would only be with respect to mitigating factors and the sentence to be meted.

39. It is therefore my view that the procedure described by the Court of Appeal ought to be adopted with necessary modifications. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court, the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst&Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

40. It has been recognised that the law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

> **"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."**

41. It is therefore clear that the law must adapt to the changing social conditions and where unlawful interference with a citizen's rights gives rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it since it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

42. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Accordingly the Courts should uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals is practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

43. To the extent that there is a specific procedure provided for under the ***Contempt of Court Act***, to seek the orders in prayer 3 in this Motion in these proceedings is premature and misconceived.

44. With respect to prayer 4, section 11(2) of the ***Fair Administrative Action Act*** empowers this Court in proceedings for judicial review relating to failure to take an administrative action, to grant any order that is just and equitable, including an order directing the taking of the decision. Accordingly, there is nothing wrong with the applicant seeking such further orders and other consequential orders, writs, declarations and directions as this Court may consider appropriate for the purpose of enforcing of the provisions of the Constitution of Kenya, though in my view that provision does not permit the Court to issue orders which were not in the contemplation of the parties. It is meant to enable the Court to give effect to its decision by for example issuing consequential orders which are not expressly provided for under any other law.

45. It was contended by the 2nd Respondent that there is no budgetary allocation to settle this claim. **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].

46. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

> **"I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein."**

47. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.

48. The Respondents contended that since they had filed an appeal, and the decision whether or not to grant judicial review orders is an exercise of discretion, the Court in making its decision ought to take that into account. **However it is clear that a** mere challenge to a judgement does not bar the Court from issuing orders of *mandamus* though the Court may well be entitled to take the same into account in the exercise of its undoubted discretion. In my view, the only way in which the Respondent can avoid payment where there is a valid judgement of a Court of competent jurisdiction, save where the conditions precedent have not been satisfied, is to show that the judgement has been set aside on appeal or on review or that an order of stay has been issued suspending the execution of the said judgement. Order 42 rule 6(1) of the ***Civil Procedure Rules*** is clear that even the pendency of an appeal does not *ipso facto* operate as a stay of the decree or order appealed against. In this case, it was averred which averment was not seriously denied that since the entry of judgement and even before that the Respondents had perfected the game of cat and mouse with the Court and the applicant. In my view that is not the kind of a conduct a party who seeks favourable exercise of discretion ought to engage in.

49. As regards immunity from personal liability of public officers, the effect of grant of an order of *mandamus* was considered *in extenso* in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another *ex parte* James Alfred Koroso** where the Court held that:

> **"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…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."**

50. Therefore the issue of public officers' immunity under section 21(4) of the ***Government Proceedings Act*** are inapplicable since in any case the said Act only applies to civil liabilities while judicial review, being neither criminal nor civil in nature to do deal with civil liabilities.

51. It was contended that the applicant neither obtained nor served upon the Respondents a certificate of order against the Government. I my view, this Court must satisfy itself that the certificate mentioned in section 21 of the said Act was served before an order of *mandamus* can issue against the Government, or against a Government department, or against an officer of the Government as such, the Court whose decision is to be implemented ought to issue a certificate in the prescribed form containing particulars of the order otherwise known as *Certificate of Order Against the Government*. Such a certificate however can only be applied for after the expiry of twenty-one days from the date of the decision 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. In other words after a decision against the Government is made the person in whose favour the decision is made must wait for at least 21 days before applying for the said prescribed certificate. However a separate certificate may be issued in respect of costs. A copy of the said certificate may then be served by the person in whose favour the decision is made upon the Attorney-General.

52. In my view it is only after the said procedure is complied with and a demand for payment is made that the cause of action accrues for the purposes of an application for an order of *mandamus* seeking to compel the Government, or a Government department, or an officer of the Government to settle the sum in question.

53. I therefore associate myself with the views expressed by **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza** (supra) that 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 and that the said provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues. In other words payment does not depend on availability of funds though nothing stops the Court from considering that fact in determining whether or not to issue the orders and what orders to issue.

54. Being a condition precedent for the issuance of an order of *mandamus*, it follows that the Court can only issue the said relief when satisfied that the said certificate was issued and served. **In other words where there is a condition precedent necessary for the duty to accrue, an order of *mandamus* will not be granted until that condition precedent comes to pass. Therefore where there is a genuine dispute as to whether the right to apply for an order of *mandamus* has matured, the Court must deal with the issue. In this case there is no averment and much less evidence of the existence of the statutory certificate under section 21 aforesaid. No such copy has been exhibited either. In Sebaggala vs. Attorney General and Others [1995-1998] EA 295 it was held that:**

> **"A "cause of action" means every fact, which, if traversed, it would be necessary for the plaintiff, to prove in order to support his right to a judgement of the Court. In other words, it is a bundle of facts which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act no cause of action can probably accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded. It does not comprise evidence necessary to prove the facts but every fact necessary for the plaintiff to prove to enable him to obtain decree. Everything, which is not proved, would give the defendant a right to an immediate judgement must be part of the cause of action. It is, in other words, a bundle of facts, which it is necessary for the plaintiff to prove in order to succeed in the suit. But it has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It is a media upon which the plaintiff asks the court to arrive at a conclusion in his favour. The cause of action must be antecedent to the institution of the suit."**

55. Therefore what constitutes the cause of action must be gleaned from the facts as averred by the parties and not on the prayers sought. With respect to judicial review, those facts are contained in the verifying affidavit. This position was restated by the Court of Appeal in **Commissioner General, Kenya Revenue Authority Through Republic vs. Silvano Anema Owaki T/A Marenga Filing Station Civil Appeal No. 45 of 2000,** where it was held that:

> **"We are certain that the issue of the procedure used does not arise inasmuch as the applicant has not ruled out the possibility of the bulk of the products containing the chemical used only in the products meant for export. That much is clear from some of the matters in the Statement accompanying the application for leave, which the Judge in his ruling, despite the statements purportedly of facts being worthless, appear to put a lot of faith in. The learned Judge decided the application for judicial review on the basis of inadmissible matters. We would observe that it is the verifying affidavit not the Statement to be verified, which is of evidential value in an application for judicial review. That appears to be the meaning of rule 1(2) of Order LIII. This position is confirmed by the following passage from the Supreme Court Practice 1976 Vol. 1 at paragraph 53/1/7:**
>
> > **'The application for leave "By a statement" – The facts relied on should be stated in the affidavit (see R v. Wandsworth JJ. ex p. Read [1942] 1 KB 281). "The statement" should contain nothing more than the name and the description of the applicant, the relief sought, and the grounds on which it is sought. It is not correct to lodge a statement of all the facts, verified by an affidavit.'**
>
> **At page 283 of the report of the case of R v. Wandsworth Justices, Viscount Caldecote CJ said:**
>
> **'The Court has listened to argument on the proper procedure or remedy in the case of the exercise by an inferior court of a jurisdiction which it does not possess. It is, however, not necessary here to consider whether or not there has been a usurpation of jurisdiction, because there has been a denial of justice, and the only way in which that denial of justice can be brought to the knowledge of this court is by way of affidavit. For that reason the court is entitled, indeed, it is bound, if justice is to be done, to look at the affidavit just as it would in an ordinary case of excess of jurisdiction.' "**

56. **Without a positive averment that the statutory certificate was issued and served, I cannot find that a cause of action for the purposes of these proceedings seeking a judicial review relief in the nature of *mandamus* had accrued.**

57. It is for that reason alone that I am unable to grant the orders sought herein. In the premises the instant application is struck out but with no order as to costs.

58. Orders accordingly.

Dated at Nairobi this 24th day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Oseko for the applicant

Miss Maina for Mr Bitta for the Respondent

CA Mwangi