



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW MISC. APPLICATION NO. 575 OF 2016

IN THE MATTER OF: AN APPLICATION BY THE COUNTY SECRETARY, NAIROBI

CITY COUNTY FOR ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF: THE COUNTY GOVERNMENTS ACT

IN THE MATTER OF THE TRANSITION TO DEVOLVED GOVERNMENTS ACT

AND

IN THE MATTER OF AND/OR THE VIOLATION OF ARTICLES 10, 40,

47, 174,175, 176, 178, AND 236 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF AND/OR BREACH OF SECTIONS

OF THE INTERGOVERNMENTAL RELATIONS ACT

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW

REFORMS ACT, CHAPTER 26, LAWS OF KENYA

AND

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

BETWEEN

REPUBLIC.....APPLICANT

AND

THE SPEAKER, NAIROBI CITY COUNTY ASSEMBLY.....1ST RESPONDENT

DR. ROBERT AYISI, COUNTY

SECRETARY, NAIROBI CITY COUNTY.....EX PARTE APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 25th November, 2016, the *ex parte* applicant herein, **Dr. Robert Ayisi, County Secretary, Nairobi City County**, seeks the following orders:

1) **AN ORDER OF CERTIORARI** removing into this Honourable Court for the purposes of the same being quashed the Gazette Notice No. 6614, Vol. CXVII dated the 8th September 2016 and issued on the 11th September 2016 by the 1st Respondent to the extent that it states that from the basement parking to the 5th Floor of the Northern Wing City Hall Building and any other office space therein to form part of the County Assembly of Nairobi.

2) **AN ORDER OF PROHIBITION** to prohibit the Respondents, staff and members of the County Assembly of Nairobi from blocking or interfering with the County Executive Committee's staff access and use of that part of City Hall Main Building particularly the Northern Wing from the basement parking to the 5th Floor, ordinarily used as office space by the Rating and Audit Departments of the Nairobi City County Government.

3) **Costs of this suit; and**

4) **Any other remedy that the court deems fit and just.**

2. According to the applicant, the 1st Respondent has through Gazette Notice Number 6614 dated the 8th September 2016 claimed part of City Hall Main Building being the entire Northern Wing from the basement parking to the 5th Floor as part of the offices belonging to the County Assembly of Nairobi.

3. It was averred that upon publishing the said Gazette Notice, the Respondents through their officers, staff and members have proceeded to barricade that part of City Hall Main Building and specifically the entire Northern Wing, and specifically offices that ordinarily houses the Rating Department and the Audit Department an act which, according to the applicant, has occasioned severe hardship upon the people of Nairobi who cannot access rating services and poses a serious risk to financial records and safety of the Nairobi City County.

4. According to the applicant, part of City Hall Northern Wing had been transferred to the Nairobi City County Government by the Transition Authority and had been used by the Rating and Audit Departments since the advent of devolved governance and the offices presently claimed by the Respondents through the impugned Gazette Notice were assigned to be offices of the County Executive by the Transition Authority.

5. It was contended that the Nairobi City County Executive has invested up to Kshs. 630,000,000.00 towards the refurbishment and installing a GIS Based Mass Valuation System for Nairobi, internet cabling in readiness for connection to LAIFORMS and IFMIS financial systems within the general area the Assembly unilaterally claims and seeks to exclude staff from the Executive.

6. The applicant contended that the acts of the Respondents are contrary to the ***Transition to Devolved Governments Act*** which had vested the authority to decide the sharing of county assets upon the Transition Authority and that further any residual functions of the Transition Authority upon its dissolution is to be performed by the Intergovernmental Relations Technical Committee.

7. The applicant therefore averred that the impugned Gazette Notice should be quashed for being illegal and contrary to express provisions of the law as it aims to undermine the authority of institutions that were set up to oversee the transition to devolved governance.

8. It was further averred that the process leading to the issuance of the impugned Gazette Notice is illegal, procedurally unfair and violated the basic tenets of the rule of law and the principles of the Constitution.

9. To the applicant, it has a legitimate expectation that the Respondents shall at all times be guided by the laws of the Republic in executing its mandates and that it shall respect and uphold the decisions and directives of independent bodies lawfully issued in the performance of their functions.

10. It was submitted on behalf of the applicant that the Respondent acted in contravention of the *Transition to Devolved Governments Act*, the *County Governments Act*, the *Intergovernmental Relations Act* and the **Constitution** by purporting to allocate to itself offices and office space that had been previously allocated to the Applicant by the Transition Authority. It was contended that the Transition Authority was, pursuant to the *Transition to Devolved Governments Act*, under an obligation to **provide for a mechanism for the transfer of government net assets and liabilities to national and county governments; assets and liabilities which may include vetting the transfer of assets during the transitional period; provide for a mechanism that will secure assets and liabilities held by the Local Authorities; audit assets and liabilities of the government, to establish the asset, debts and liabilities of the government; and audit assets and liabilities of local authorities, to establish the asset, debts and liabilities of each Local Authority among other functions. These functions of the Transition Authority were however taken up by the Intergovernmental Relations Technical Committee which was established under the *Intergovernmental Relations Act*.**

11. **According to the applicant, section 11 of the *Intergovernmental Relations Act* establishes this committee and its mandate are outlined under section 12 and specifically sub-clause (b) thereof outlines the mandate to include: to take over the residual functions of the transition entity established under the law relating to transition to devolved government after dissolution of such entity. Therefore being a successor of the Transition Authority, the Intergovernmental Relations Technical Committee is to prepare an inventory of assets and liabilities, if any, to be transferred to County Governments. In the premise, if there is any such properties and/or assets to be further transferred to any County Government entity, that, should be the mandate of the Intergovernmental Relations Technical Committee.**

12. It was therefore submitted that the Respondent cannot usurp the powers of the Intergovernmental Relations Technical Committee and purport to allocate to itself assets previously held by the defunct Nairobi City Council. It follows therefore that the said acts by the Respondent are a nullity and void *ab initio* and hence the Gazette Notice effecting the purported transfer ought to be quashed through the orders of certiorari.

13. It was further submitted that the impugned notice is as well contrary to the express provisions of the **Constitution**, the *County Governments Act* and the *Transition to Devolved Governments Act* as it seeks to oust the mandate of the Transition Authority and the Intergovernmental Relations Technical Committee. Apart from that the impugned notice is unreasonable, ultra vires, made in bad faith and irrational as it seeks to oust the express provisions of a statute moreover in light of the fact that the said premises had been transferred to the Nairobi County Executive who have since been using the offices for providing services to the people.

14. In addition, it was submitted that the process leading to the impugned notice herein was procedurally unfair since there was no consultation with the County Executive; there was no public participation; and the said decision was reached unilaterally and in a manner inconsistent with the principles and values of governance as enshrined under **Article 10** of the **Constitution**.

15. The applicant submitted that the Role of the Speaker of a County Assembly has clearly been outlined under Article 178 of the Constitution which provides that:

(1) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.

(2) A sitting of the county assembly shall be presided over by-

(a) The speaker of the assembly; or

(b) In the absence of the speaker, another member of the assembly elected by the assembly.

16. His role, it was submitted was outlined by the Court in **Judicial Service Commission vs. Speaker of The National Assembly & 8 Others, Petition No. 518 of 2013**, where it was noted that:

[84] In determining this issue, we consider the place of the Speaker in relation to the operations of the National Assembly. The position and functions of the Speaker are provided for in general terms in the Constitution. Article 97 provides for the composition of the National Assembly, and at Article 97(1)(d), indicates that the National Assembly includes the Speaker, who is an ex officio member. Article 107 provides that it is the Speaker of the respective Houses of Parliament who shall preside at sittings of the Houses, with the Speaker of the National Assembly presiding at joint sittings of both Houses.

[85] The specific roles are better spelt out or emerge from the National Assembly (Powers and Privileges) Act, the Standing Orders and Parliamentary practice. To illustrate, under the National Assembly (Powers and Privileges) Act, it is the Speaker who is given power to safeguard the privileges of the National Assembly by the issue of such orders as are necessary for the better carrying out of the provisions of the Act, and issue a Code of Conduct for Members under section 9. Under the Standing Orders, it is the Speaker who determines the business of the House, restrains disorderly conduct and restricts debate (Standing Orders 98, 102, 103 – 107, 112); and whether motions tabled by Members of Parliament are admissible. If they are in violation of the Constitution or an Act of Parliament, he may propose changes or rule that they are inadmissible. Indeed, nothing is done within the National Assembly that does not have the approval of the Speaker.

[86] The Speaker is the Presiding Officer of the House, with very wide discretion under Standing Order 1. He is the representative of the House in relation to other organs and authorities such as the Presidency and the Senate (Standing Order 41 and 42). He rules on points of order in the House and his rulings are binding precedents in the National Assembly.

[87] The Speaker makes orders in relation to procedures and debate in the House; and has the responsibility to transmit decisions of the House. Further, under section 6 of the National Assembly (Powers and Privileges) Act which prohibits service of process within the precincts of Parliament, such processes where they relate to the attachment of a Member's salary can be served or executed through the Speaker. He is, in law and effect therefore, the Presiding and Principal Officer of the National Assembly on whose shoulders lie the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly.

17. According to the applicant, nowhere in the above provision is it stated that the role of the Speaker is to transfer assets among County Government organs. It follows therefore that the Respondents herein are acting in excess of the powers and in contravention of statutory provision by usurping powers not vested in them. Similarly, the 2nd Respondent herein, the County Assembly of Nairobi City County does not have the powers to allocate to itself assets/properties previously owned by the defunct City Council of Nairobi.

18. It was submitted that pursuant to Article 185 of the **Constitution**, the County Assemblies are vested with legislative powers and are granted the mandate to make any laws that are necessary for, or incidental to, the effective performance of the functions and exercise of the powers of the county government under the Fourth Schedule. To the applicant, any issues therefore touching on the transfer and/or distribution of

assets previously owned by the defunct City Council of Nairobi are matters reserved for the Intergovernmental Relations Technical Committee and no other organ.

19. It was the applicant's that this matter is well before this Honourable Court and this Court acted within its powers in granting leave to the Applicants to institute these proceedings. In the circumstances of the present case, the six months rule in filing judicial review orders only applies to formal judgments, orders and decrees of the Court. In this respect the applicant relied on **Republic vs. Principal Registrar of Government Lands & Attorney General Ex Parte John Ngugi Gathumbi, Misc Application No. 10 of 2013** and **Jitesh Shah & Highland Textiles Limited vs. Nairobi District Lands Registrar, Miscellaneous Application JR No. 294 of 2011**, which maintained the above position by stating thus:

20. The foregoing notwithstanding, it will be noted that the Applicant herein has also sought for orders of prohibition and the order of prohibition does not have any limitation of time and as such, the present Application cannot be said to be defective.

21. The applicant also relied on **Republic vs. Kenya Urban Road Authority & 2 Others, Judicial Review Misc. Civil Application No. 121 of 2016**, which observed that:

[11] From the above provision, it is clear that to challenge any order, decision, or proceeding by way of Judicial Review orders of certiorari leave must be obtained within 6 months from the date of such decision. According to the respondent's counsel, the application for certiorari cannot stand because it was brought after 6 months from 15th September 2015. On the other hand, the ex parte applicant maintains that the application for leave was brought before expiry of 6 months on 15th March 2016. The law is clear that leave for certiorari must be sought before the end of 6 months from the date of the decision which is brought to be quashed, since, that leave is sine quo non the lodging of the substantive motion. It is that leave that confers on this court the jurisdiction to hear the substantive motion seeking for Judicial Review Orders of certiorari. That being the case, although there are other prayers for mandamus and prohibition which are not limited by the 6 months period within which leave should be brought, where the court finds that application for leave for orders of certiorari was not brought or filed within 6 months from the date of the impugned decision, then the court would not have the jurisdiction to hear and determine the Judicial Review prayers for certiorari and it would proceed to strike out that prayer and leave the other prayers which are properly brought. In other words, the issue of limitation of time is a point of law which goes to the root of the matter. Leave to apply for Certiorari is so fundamental that without it, this court cannot hear and determine the prayer for certiorari."

22. It was the applicant's case that he had satisfied the criteria to warrant the orders sought in the present suit. Based on **Republic vs. National Transport & Safety Authority & 10 Others Ex Parte James Maina Mugo, Judicial Review Case No. 447 of 2014** and **Kenya Anti-Corruption Commission vs. Republic & 4 Others, Civil Appeal No. 284 of 2009** it was submitted that orders of prohibition are thus efficient in instances where there has been a flagrant breach of the law and hence a party needs to be prevented from effecting or continuing to effect an illegality.

23. It was contended that in the circumstances, public interest shifts in favour of the Applicant as the Respondent's actions have been and continue to impede on the rights of the public and service provision in regard to rating and auditing. The Respondent has usurped the powers and functions of the Intergovernmental Relations Technical Committee and purported to allocate assets of the defunct City Council of Nairobi. That is an illegality which goes contrary to the principles of devolved governance, the ***County Government Act***, the ***Intergovernmental Relations Act***, the ***Transition to Devolved Governments Act*** and the ***Constitution of Kenya, 2010***.

24. The Applicant therefore called upon this Honourable Court to intervene and cure the illegality at hand for the benefit of the greater public by granting the orders sought herein.

Respondent's Case

25. The Respondent opposed the application.

26. According to him, contrary to the misleading picture painted by the Applicant, the Nairobi City County Assembly has always had legal right to exclusively occupy, and has been in actual occupation, of the Northern Wing of the City Hall Building (“the suit premises”) since the introduction of the devolved system of government in 2013. In other words, the County Assembly did not suddenly emerge from the blues to claim the right of occupation of the suit premises as suggested by the Applicant.

27. It was contended by the Respondent that this Court has no jurisdiction to entertain the proceedings herein because (inter alia):

a. the impugned gazette notice was published on 11th September 2015, i.e. 15 months prior to the institution of the application for leave;

b. section 9(3) of the **Law Reform Act** (Chapter 26 of the Laws of Kenya) as read with Order 53 Rule 2 of the Civil Procedure Rules, 20110 preclude the Honourable Court from granting leave to apply for the order of certiorari where the leave application is made more than six months after the making of the judgment, order, decree, conviction or other proceedings sought to be quashed by such order;

c. the order of prohibition, the other judicial review order sought in these proceedings, cannot issue to reverse a decision already made and implemented;

d. stay orders cannot issue where the impugned decision has already been implemented since the essence of an order for stay is to preserve the *status quo*;

e. Articles 117(2) and 196 (3) of the Constitution as read with—

i. section 17 of the **County Governments Act, 2012**; and

ii. sections 2, 8, and 13 of the **National Assembly (Power and Privileges) Act**,

preclude the Honourable Court from entertaining proceedings having the object or effect of forcing the Speaker to admit strangers into the precincts of the Nairobi City County Assembly. In other words, these constitutional and statutory provisions oust the jurisdiction of the Honourable Court to entertain proceedings having the object or effect of reversing the powers and privileges of the Assembly relating to the admission or accommodation of strangers into its precincts;

f. the Applicant has not demonstrated any illegality, irrationality, procedural impropriety or any other wrongdoing on the part of the Respondents capable of being remedied by an order of judicial review; and

g. the Applicant has not demonstrated any right or interest personal to himself that has been infringed on or affected by the impugned gazette notice.

28. It was averred that section 136 (1) of the **County Governments Act, 2012** empowered the Independent Electoral and Boundaries Commission (“the IEBC”) to determine the place date and time of the first sittings of county assemblies after the first general election under the 2010 Constitution and pursuant thereto, on 13th March 2013, the IEBC published Gazette Notice No. 3158 designating the place, date, and time for the first sitting of the various County Assemblies. From the said instrument, the applicant submitted that the IEBC generally gazetted the chambers and offices of the defunct local authorities as the places of the first sittings of county assemblies after the 2013 general election and determined the suit premises to be the place of the first meeting of the County Assembly.

29. In the Respondent's view, the object, rationale, and purpose of section 136 (1) of the **County Governments Act, 2012** and Gazette Notice No. 3158 of 13th March 2013 was to reserve certain properties of the defunct local authorities to be used as the precincts of county assemblies and accordingly, avoid unnecessary construction expenditure and the crippling of county assemblies by denial or lack of premises for discharging their constitutional and statutory mandate.

30. Consequently, on 11th September 2015, the Respondent published Gazette Notice No. 6614 ("**the impugned decision**") declaring the suit premises as the precincts of the Assembly pursuant to powers, privileges and immunities deriving from articles 117 (2) and 196 (3) of the Constitution of Kenya, 2010 as read with section 17 of the **County Governments Act, 2012**; sections 2, 8, and 13 of the **National Assembly (Power and Privileges) Act**; and paragraphs 224, 225 and 226 of the Standing Orders of the Nairobi City County Assembly.

31. The Respondent however clarified that although the IEBC had allocated the whole of the suit premises to the County Assembly, the impugned decision only covered the Northern Wing. It was its position that although Gazette Notice No. 3158 entitled the County Assembly to occupy the whole of the suit premises, the County Executive insisted on occupying and using the same. As a result, the County Assembly and the County Executive held several consultative meetings and negotiations with a view to resolving the standoff arising from the latter's insistence on using the suit premises. Consequently, the County Assembly and the County Executive eventually resolved and agreed that the County Executive would clear the basement area of the suit premises of all vehicles **within seven days** of the date of the meeting of 18th October 2016; the Internal Audit Department would vacate the 5th Floor of the suit premises within one month of the date of the meeting of 18th October 2016; the Valuation Department would vacate the suit premises within two months of the date of 18th October 2016; and the Applicant agreed to ensure compliance with the resolutions in (i) to (iv) above.

32. It was averred that although the County Executive had ample alternative premises for the Valuation, Rating and Audit departments, it reneged on the said agreement and that in particular, the County Executive moved the Valuation and Rating Departments to the City Hall Annex Building but immediately started renovating the 4th floor of the suit premises with a view to resuming occupancy; and refused to move the Audit Department as agreed hence the Audit Department continues to occupy the 5th Floor of the suit premises.

33. It was averred that the County Executive's refusal to honour the agreement alluded to has caused immeasurable hardship and inconvenience to the County Assembly. In particular, the County Executive's refusal to honour the agreement has denied the Assembly's 127 members, and the secretariat, sorely needed office space; and accordingly, gravely undermined the capacity of the Assembly to effectively discharge its constitutional and statutory mandate.

34. The Respondent relied on section 2 of the **National Assembly (Power and Privileges) Act** which defines the precincts of the assembly as follows:

"precincts of the Assembly" includes the Chamber, every part of the building in which the Chamber is situated, the offices of the Assembly, the galleries and places provided for the use or accommodation of members, strangers, members of the public and representatives of the press, and any forecourt, yard, garden, enclosure or open space appurtenant thereto and used or provided for the purposes of the Assembly:

Provided that any part of the buildings, forecourt, yard, garden, enclosures or open space may, by an order signed by the Speaker and published in the Gazette, be excluded from the foregoing definition, either generally or for specific purposes, and either temporarily or permanently.

35. In his view, as is evident from the foregoing statutory definition, the precincts of the Assembly include "**every part of the building in which the chamber is situated...**" This means that the whole of City Hall Building is part of the precincts of the County Assembly, as provided for under section 2 of the

National Assembly (Privileges and Immunities) Act and in Gazette Notice No. 3158 of 13th March 2013. To him, although the above statutory definition and Gazette Notice No. 3158 of 13th March 2013 entitled the County Assembly to keep the whole of the City Hall Building, the Assembly was sufficiently magnanimous, in view of the negotiations and agreement alluded to in the preceding paragraphs of this Affidavit, to allow the County Executive to occupy part of the building and that is why the impugned gazette notice restricts the precincts of the Assembly to the Northern Wing.

36. In the Respondent's view, the effect of the judicial review orders sought in these proceedings would be to compel the Speaker of the County Assembly to allow strangers into the precincts of the County Assembly, contrary to the aforesaid constitutional and statutory immunities and privileges.

37. It was the Respondent's contention that the following allegations made by Applicant are false and unfounded in law and in fact, namely:

h. the alleged allocation of the suit premises to the County Executive by the Transitional Authority. To him, the power to allocate premises to county assemblies had been donated to the IEBC as opposed to the Transitional Authority. While on this matter, it is noteworthy that the Applicant has not annexed any Gazette Notice or other formal instrument from the Transitional Authority allocating the suit premises to the County Executive;

i. the alleged investment of KShs.630,000,000.00 in the suit premises. Again, the Applicant has not placed any evidence before the Honourable Court to prove the alleged investment;

j. the alleged lack of communication and/or consultation with the County Executive in gazetting the impugned decision. As stated, there were several consultative meetings and negotiations, some of which were attended by the Applicant in person.

38. It was therefore the Respondent's case that the judicial review proceedings herein are misconceived, incompetent and incurably defective and urged the Court to dismiss the same with costs.

Determinations

39. I have considered the application, the affidavits both in support of and in opposition to the application as well as the submissions made.

40. It was alleged by the Respondent that the impugned gazette notice was published on 11th September 2015, i.e. 15 months prior to the institution of the application for leave. To the Respondent, section 9(3) of the **Law Reform Act** (Chapter 26 of the Laws of Kenya) as read with Order 53 Rule 2 of the **Civil Procedure Rules, 2010** preclude the Court from granting leave to apply for the order of certiorari where the leave application is made more than six months after the making of the judgment, order, decree, conviction or other proceedings sought to be quashed by such order.

41. However in **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA No. 688 of 2006 [2008] KLR 362** the High Court, dealing with the same issue expressed itself as follows:

“A reading of section 16 of the KNHCR Act, 2002 shows that the Commission has both investigative and adjudicative functions and we find that it is one of the subordinate courts envisaged under section 65 (1) and 84 (3) of the Constitution and would therefore be subject to the supervisory powers of the High Court... What is sought to be quashed is the regulations which are said to have been gazetted on 16/9/05 vide Gazette Supplement 67 of 2005 and yet this application was filed on 16/11/06, over a year after the gazettelement. We do agree with the submission by Mr Ojiambo and which submission we subscribe to, that order 53 rule 2 only relates to the challenge of formal orders set out under that rule that is judgments, decrees, orders etc. It does not apply to other decisions like this situation. The 6 month's limitation only applies to formal orders mentioned in rule 2 and nothing else and

that it does not apply to decisions which are null ab initio. Where a body lacks jurisdiction it cannot be said that there was a valid decision in the first place, for time to start running against certiorari. We hold that the 6 months limitation does not apply to the impugned Regulations.”

42. I also wish to refer to **R. vs. The Judicial Inquiry Into The Goldernberg Affair Ex Parte Hon Mwalulu & Others HCMA No. 1279 of 2004[2004] eKLR** and **Republic vs. The Commissioner of Lands Ex Parte Lake Flowers Limited Nairobi HCMISC. Application No. 1235 Of 1998.** In these cases it was similarly held that the 6 months limitation period set out in Order 53 rules 2 & 7 only applies to the specific formal orders mentioned in Order 53 rules 2 and 7 and to nothing else and that Order 53 rule 2 and 7 only applies to the formal orders and proceedings mentioned therein and matters not mentioned are not barred by the 6 months limitation.

43. The phrase “or other proceedings” for the purposes of judicial review has been considered by the Tanzania Court of Appeal in **Mobrama Gold Corporation Ltd vs. Minister for Water, Energy and Minerals & Others Dar-Es-Salaam Civil Appeal No. 31 of 1999 [1995-1998] 1 EA 199,** in which case the said Court held that the phrase “or other proceedings” has to be construed *ejusdem generis* with judgement, order or decree, and conviction as having reference to a judicial or quasi judicial proceedings as distinct from acts and omissions for which certiorari may be applied for.

44. What is sought to be quashed in these proceedings is a gazette notice. In my view the same does not qualify as one falling within the genre of the matters contemplated under Order 53 rules 2 and 7 aforesaid. Accordingly, I find that the application is not time barred.

45. According to the Respondent the order of prohibition, the other judicial review order sought in these proceedings, cannot issue to reverse a decision already made and implemented. However as was held in **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.:**

“It would be a travesty to justice, a sad day for justice should the procedures or the processes of court be allowed to be manipulated, abused and/or misused, all in the name that the court simply has no say in the matter because the decision to so utilise the procedures has already been made. It has never been be argued that because a decision has already been made...the court should simply as it were fold its arms and stare at the squabbling litigants/ disputants parade themselves before every dispute resolution framework one after another at every available opportunity until the determination of the one of them because there is nothing, in terms of decisions to prohibit...The fact that it has not been argued before however does not mean that the law stops dead at its tracks.”

46. In other words it is only where the decision is complete that an order of prohibition will not issue. Where there are certain steps which are yet to be undertaken in order to bring the matter to fruition, it is my view that an order of prohibition may still be issued. In this case the act of blocking the applicant’s staff is a continuous process that may be prohibited at any stage if proved that the same was wrongful.

47. The issue before me revolves around the powers of the Respondent. Article 178 of the Constitution provides that:

(3) Each county assembly shall have a speaker elected by the county assembly from among persons who are not members of the assembly.

(4) A sitting of the county assembly shall be presided over by-

(c) The speaker of the assembly; or

(d) In the absence of the speaker, another member of the assembly elected by the assembly.

48. According to the applicant, nowhere in the above provision is it stated that the role of the Speaker is

to transfer assets among County Government organs. It follows therefore that the Respondents herein are acting in excess of the powers and in contravention of statutory provision by usurping powers not vested in them. Similarly, the 2nd Respondent herein, the County Assembly of Nairobi City County does not have the powers to allocate to itself assets/properties previously owned by the defunct City Council of Nairobi.

49. In the said Gazette Notice, the Respondent relied on Articles 117(a) and 186 of the Constitution as read with section 17(2) of the *County Governments Act, 2012*, sections 2, 8 and 13 of the *National Assembly (Powers and Privileges) Act*, Standing Orders Nos. 224, 225 and 226 of the *Nairobi City County Assembly Standing Orders* in declaring what constitutes the precincts of the Nairobi City County Assembly.

50. Article 117(2) provides as follows:

Parliament may, for the purpose of the orderly and effective discharge of the business of Parliament, provide for the powers, privileges and immunities of Parliament, its committees, the leader of the majority party, the leader of the minority party, the chairpersons of committees and members.

51. Clearly this provision does not empower the Respondents to issue directives in the nature contained in the impugned Gazette Notice. Article 186 on the other hand provides that:

(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(4) For greater certainty, Parliament may legislate for the Republic on any matter.

52. Similarly this provision has nothing to do with declaration of what constitutes the precincts of the Assembly. Section 17(2) of the *County Governments Act*, on the other hand provides that:

The national law regulating the powers and privileges of Parliament shall, with the necessary modifications, apply to a county assembly

53. It is clear that the above provision does not empower the Respondent to take the action that he took vide the said Gazette Notice.

54. In the replying affidavit, the Respondent took the position that the Assembly has always had legal right to exclusively occupy, and has been in actual occupation, of the Northern Wing of the City Hall Building since the introduction of the devolved system of government in 2013. If this was the position then there was no need for the publication of the impugned Gazette Notice.

55. The Respondent has further relied on Gazette Notice No. 3158 which dealt with the “first sitting of the County Assembly” as the one that conferred on it the whole of the premises of the defunct local government. That Gazette Notice however does not confer on any particular person the said premises. It only publishes the place, date and time of the first sitting of the County Assembly without necessarily conferring proprietary rights over the premises published for the said purpose.

56. According to the applicant, section 11 of the *Intergovernmental Relations Act* establishes the Intergovernmental Relations Technical Committee and its mandate are outlined under section 12 and specifically sub-clause (b) thereof outlines the mandate to include: to take over the residual functions

of the transition entity established under the law relating to transition to devolved government after dissolution of such entity. Therefore being a successor of the Transition Authority, the Intergovernmental Relations Technical Committee is to prepare an inventory of assets and liabilities, if any, to be transferred to County Governments. In the premise, if there is any such properties and/or assets to be further transferred to any County Government entity, that should be the mandate of the Intergovernmental Relations Technical Committee.

57. Section 7 of the ***Transition to Devolved Government Act*** which dealt with the functions of the Transitional Authority stated that its functions were *inter alia* the preparation and validation of an inventory of all the existing assets and liabilities of government, other public entities and local authorities and providing mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period. It is not in doubt that the suit premises belonged to the defunct local authority.

58. Section 33 of the sixth schedule to the Constitution provides that:

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.

59. According to **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**:

“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.”

60. In my view, unless otherwise provided the County Governments naturally take over the assets and liabilities of the defunct local authorities and therefore the County Assembly cannot claim exclusive proprietorship of any of those assets.

61. It was contended that sections 2, 8, and 13 of the ***National Assembly (Power and Privileges) Act***, preclude the Court from entertaining proceedings having the object or effect of forcing the Speaker to admit strangers into the precincts of the Nairobi City County Assembly. In other words, these statutory provisions oust the jurisdiction of the Honourable Court to entertain proceedings having the object or effect of reversing the powers and privileges of the Assembly relating to the admission or accommodation of strangers into its precincts.

62. On this issue I wish to refer to Article 2 of the Constitution which provides that:

(1) This Constitution is the Supreme law of the Republic and binds all persons and all state organs at both levels of government.

(2) No person may claim or exercise state authority except as authorised under this Constitution.

63. Further, I defer to the words of **Kasanga Mulwa, J** in **R vs Kenya Roads Board exparte John Harun Mwau HC Misc Civil Application No.1372 of 2000** that:

“Once a Constitution is written, it is supreme. I am concerned beyond peradventure that when the makers of our Constitution decided to put it in writing and by its provision thereof created the three arms of Government namely the Executive, the Legislature and the Judiciary, they intended that the Constitution shall be supreme and all those organs created under the Constitution are subordinate and subject to the Constitution.”

64. In my view, if any of the state organs steps outside its mandate, or invokes its lawful mandate for the achievement of improper purpose, this Court will not hesitate to intervene. The Supreme Court has ably captured this fact in **Re The Matter of the Interim Independent Electoral Commission Advisory Opinion No.2 of 2011** where it expressed itself as follows:

“The effect of the constitution's detailed provision for the rule of law in the process of governance, is that the legality of executive or administrative actions is to be determined by the courts, which are independent of the executive branch. The essence of separation of powers, in this context, is that in the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several government organs functions in splendid isolation.”

65. Subsequently, the same Court in **Speaker of National Assembly -vs-Attorney General and 3 Others (2013) eKLR** stated that:

“Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering its opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act. ”

66. The Court went on to state as follows;

“Whereas all State organs, for instance, the two Chambers of Parliament, are under obligation to discharge their mandates as described or signalled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of “right” and “wrong” in such cases, short of a resolution in plebiscite, is only the Courts.”

67. In my view the immunity extended to the County Assembly only applies where the Assembly is performing its legislative mandate and not otherwise. The publication of a gazette notice is not a legislative mandate of the Respondent. Even where the immunity applies it does not sanitise actions which are undertaken contrary to the Constitution.

68. It is therefore my view that the Respondents herein had no power to publish Gazette Notice No. 6614 of 11th September, 2016.

Order

69. Consequently this Motion succeeds and I issue the following orders:

1. **AN ORDER OF CERTIORARI** removing into this Honourable Court for the purposes of the same being quashed the Gazette Notice No. 6614, Vol. CXVII dated the 8th September 2016 and issued on the 11th September 2016 by the 1st Respondent to the extent that it states

that from the basement parking to the 5th Floor of the Northern Wing City Hall Building and any other office space therein to form part of the County Assembly of Nairobi which Notice is hereby quashed.

2. AN ORDER OF PROHIBITION prohibiting the Respondents, staff and members of the County Assembly of Nairobi from blocking or interfering with the County Executive Committee's staff access and use of that part of City Hall Main Building particularly the Northern Wing from the basement parking to the 5th Floor, ordinarily used as office space by the Rating and Audit Departments of the Nairobi City County Government.

70. Considering the symbiotic relationship between the parties herein there will be no order as to costs.

71. It is so ordered.

Dated at Nairobi this 2nd day of August, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Orero for Mr Otieno Willis for the applicant.

Mr Odhiambo for the Respondent.

CA Mwangi