



IN THE HIGH COURT

AT KISUMU

PETITION NO. 29 OF 2010

IN THE MATTER OF ALLEGED CONTRAVENTION

OF ARTICLES 27, 28, 40 AND 47(2)

OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTION 21(4) OF THE GOVERNMENT PROCEEDINGS ACT

AND

IN THE MATTER OF ORDER 29 RULE (2) (2) OF THE CIVIL PROCEDURE RULES 2010

BETWEEN

NAHASHON OMWOHA OSIAKO & 66 OTHERS....PETITIONERS

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

KENYA SECTION OF INTERNATIONAL

COMMISSION OF JURISTS (OPEN SOCIETY

JUSTICE INITIATIVE).....AMICUS CURIAE

JUDGMENT

Introduction

1. The core issue raised in this petition is whether or not **section 21(4)** of the *Government Proceedings Act (Chapter 40 of the Laws of Kenya)* (“the *GPA*”) is a violation of **Articles 27, 28, 40 and 47(2)** of the Constitution. **Section 21(4)** of the *GPA* essentially prohibits execution or attachment of process of that nature against the Government as a means for enforcing orders and decrees of the court.

Background

2. On 22nd June, 2010, **NAHASHON OMWOHA OSIAKO** filed this petition on the grounds among others that the respondent had failed to satisfy a decree for general damages awarded to him in **Maseno SRMCC No. 279 of 2006** following an accident where he was travelling with other in a Government vehicle.

3. During the pendency of the petition and more particularly on 3rd May, 2012 **SAMWEL APWOKA & 66 OTHERS** who had decrees issued in their favor in various courts were enjoined to this petition. Subsequently, the Amicus Curiae were enjoined in this suit by consent of the parties made on 24th July, 2014.

4. The petitioners' case emanates is brought on grounds among others that the respondent, though served has not satisfied the resulting decrees and certificates of costs.

5. In the Petition amended on 19th January 2011, the petitioners seek the following orders:

a) THAT this Honourable Court do declare that the humble petitioner's Constitutional right under Article 27 has been, and continues to be violated by section 21(4) of the Government Proceedings Act in so far as it removes enforceability, creates a distinct class of unenforceable decrees and in so far as it confers upon the Government unequal protection and unequal benefit of the law from other Judgment Debtors

b) THAT this Honourable Court do declare that the humble petitioner's Constitutional right under Article 28 has been, and continues to be violated by Section 21(4) of the Government Proceedings Act in so far as it subjects him to a life of penury and poverty, and, subjects him to subjugation from his judgment debtor

c) THAT this Honourable Court do declare that the humble petitioner's right under Article 40 has been, and continues to be violated by Section 21(4) of the Government Proceedings Act, in so far as it makes no provision for execution of decrees against the respondent, and in so far as it deprives him of the fruits of his judgment hence property; and in so far as it limits or restricts enjoyment and access to their decretal amount from the judgment debtor and in so far as the state has enacted a law that deprives property or limits enjoyment of property

d) THAT this Honourable Court do declare that the humble petitioner's right under Article 47 has been, and continues to be violated by Section 21(4) of the Government Proceedings Act, in so far as it grants immunity to the state officials from execution of court process, and, in so as it insulates Government officials from requirements of Article 47(2), and, in so as Section 21(4) of the Government Proceedings Act does not promote efficient administration and promotes inefficiency and maladministration.

e) THAT Section 21(4) of the Government Proceedings Act be declared inconsistent with Articles 27, 28 and 40 of the Constitution.

f) THAT to the extent of the inconsistency or any inconsistencies stated herein, Section 21(4) of the Government Proceedings Act be declared null and void.

g) THAT Order 29 rule 2(2) and rule 4(1) of the Civil Procedure Rules be declared unconstitutional, invalid and null and void.

h) THAT this Honourable Court do award compensation for infringement of the humble petitioner's fundamental rights by the respondent.

i) THAT Costs be provided for.

j)

The Petitioner's Case

6. The petitioners' contend that **section 21(4)** of the *GPA and Order 29 rule (2)(2)* of the *Civil Procedure Rules, 2010* ("the *CPR*") that shields the state from execution by attachment of its property that prohibits execution against the Government breaches the petitioners' right to equality before the law and the right to equal protection and equal benefit of the law enshrined in **Article 27** of the Constitution; denies them inherent dignity enshrined in **Article 28** of the Constitution; arbitrarily deprives them enjoyment of property rights enshrined in **Article 40** of the Constitution and breaches their right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair enshrined in **Article 47** of the Constitution.

7. The petitioners claim a violation of **Articles 27, 28, 40 and 47(2)** of the Constitution in so far as **section 21(4)** of the *GPA* removes enforceability of decrees by way of execution by attachment of Government property. They contend that the *GPA* creates a class of unenforceable decrees which is discriminatory, unconstitutional and inconsistent with **Article 27** of the Constitution.

8. The petitioners submitted that **section 21(4)** of the *GPA* renders judicial proceedings and judgments against the Government futile and unnecessary. Further, the mode of enforcement of such judgment through institution of judicial review proceedings for order of mandamus is burdensome on the petitioners and other persons who wish to enforce those judgments.

9. The petitioners cited the judgment of the Constitutional Court of South Africa in *Nyathi v Member of the Executive Council for the Department of Health Gauteng & Another CCT 19/07 [2008] ZACC 8* to support their claim for a declaration that **section 21(4)** of the *GPA and Order 29 rule (2) (2)* of the *CPR* that effectively place the State above the law is unconstitutional.

Respondent's Case

10. The respondent opposed the petition through the replying affidavit sworn by Wanjiku A. Mbiyu, the Chief State Counsel working in the Office of the Attorney General and Department of Justice, sworn on 28th September 2016. She contended that the total amount due amounting to Kshs. 7,512,184.80 in respect of 23 of the petitioners was on 9th October 2012 paid to the petitioner's advocates a fact that has not been controverted. The replying affidavit did not deal with the unsettled decrees in favour of the 44 of the petitioners who were later joined to the suit.

11. The respondent contended that attachment as a remedy is not available to the petitioners and that the logic behind **section 21(4)** of the *GPA and Order 29 rule (4)* of the *CPR*, which expressly prohibits such action, is meant to protect public interest in that state operations would ground to a halt if attachment and sale of government property was allowed. The respondent cited *Kisya Investments Ltd v Attorney General & Another [2005] 1 KLR 74* and the Malawi case of *Tratsel Supplies Limited v Mwakalinga 12 MLR 72*.

12. **The respondent** argued the State did not have a universal fund for settlement of decrees against the state and that accounting officers cannot expend what has not been budgeted for. Thus when the procedure prescribed in **section 21(3)** of the *GPA* is followed; the Accounting Officer for the relevant Government department is obliged to ensure that the judgment debts are provided for in the appropriation and ultimately paid. In the circumstances, the respondent argued that **section 21 (4)** of the *GPA* does not prevent petitioners from realizing the fruits of their judgment if they followed the laid down procedures.

13. Citing the case of *Pravin Bowry v Ethics & Anti-Corruption Commission [2015] eKLR*, the respondent submitted that the principle of equality provided in **Article 27** of the Constitution does not entail universal application for all persons who are not by nature or attainment of circumstances in the same position. The respondent urged the court to exercise restraint in its power to declare statutes or sections of the law to be invalid as the petitioners had not demonstrated sufficient cause for the grant of the orders sought.

14. The Amicus Curiae's interest in this petition is founded on the ground that the petition raises serious and weighty constitutional issues which touch on the enforcement of rights of individuals. The amicus curiae filed a comprehensive brief setting out the context for evaluation of the constitutionality of **section 21(4)** of the **GPA** based on the constitutional imperative for the legislature to provide an effective remedy for breach of human rights which is undermined by granting the Government immunity from enforcement of judgments.

15. The thrust of its submission by referencing international treaties, conventions and case law from international tribunals is that the enforcement of court judgments is an essential part of the right to a fair trial, an effective remedy, an independent judiciary and equal access to the court. It highlighted the binding nature of international law, international treaties and conventions to which Kenya is a party under the **Articles 2(5) and (6)** of the Constitution.

16. The amicus curiae contended it is the duty of states to execute judgments as part of the obligation to ensure the right to an effective remedy under **Article 2(3)** and the right to a fair trial under **Article 14(1)** of the **International Covenant on Civil and Political Rights (ICCPR)**. Under the **African Charter on Human and People's Rights**, the right to the execution of a judgment is part of the right to an effective remedy and the right to a fair trial and independence. In **Bissangou v Republic of Congo, ACPHR, Communication 253/2002(2006)**, the African Commission held that the Democratic Republic of Congo's refusal to enforce and execute judicial decisions awarding compensation for property lost during political upheaval violated the complainant's rights to equal protection before the law and to a fair trial. Closer to home, the amicus curiae asserted that the duty to honour judgment could be located in the **Treaty for the Establishment of the East African Community** which affirms that, "good governance including adherence to the principles of rule of law" is a fundamental principle of the Community. It cited the case of **James Katabazi and 21 Others v Secretary General of the EAC & Attorney General of the Republic of Uganda (EACJ, Judgment of 1st November 2007)** where it was held that abiding by the court's decisions is the cornerstone of the independence of the judiciary which is on the principles of observation of the rule of law. Thus, it argued that the EAC Treaty obligates member states to enforce judgments.

17. The amicus curiae also referred to comparative jurisprudence from United Kingdom and South Africa to demonstrate the ways in which these countries have surmounted barriers to laws that impede enforcement of effective remedies. These countries, being part of the commonwealth heritage, adopt similar legislation that immunize the Government from execution and attachment of its property. Of particular note, the case of **Nyathi v Member of the Executive Council for the Department of Health (Supra)** was cited to demonstrate a radical departure from the traditional approach to immunity and acceptance of duty of the court to ensure that effective relief is granted for the violation of human rights.

Analysis and Determination

18. As we have stated at the commencement of this judgment, the issue for consideration is whether **section 21(4)** of the **GPA** and **Order 29 rule (2) (2)** of the **CPR** are unconstitutional and if so, what relief this court should grant.

19. Before we proceed with our analysis, it is important to set out the relevant provisions of **section 21** of the **GPA** which state as follows;

21 (1) 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.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(3) 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.

(4) Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs.

(5) This section shall, with necessary modifications, apply to any civil proceedings by or against a county government, or in any proceedings in connection with any arbitration in which a county government is a party.

20. The provisions of the **CPR** are a consequence of, and an elaboration of the **section 21(4)** of the **GPA**. **Order 29 rule 2** of the **CPR** prohibits certain orders, including executions of orders and decrees by way of attachment and sale, against the Government as follows;

2. No order against the Government may be made under—

(a) Order 14, rule 4 (Impounding of documents);

(b) Order 22 (Execution of decrees and orders);

(c) Order 23 (Attachment of debts);

(d) Order 41 (Appointment of receiver).

21. The effect of these provisions is that whereas execution proceedings by way of attachment and sale of the Governments assets are not available against the Government, the accounting officer of the relevant Government department is nevertheless under a statutory duty to satisfy a judgment made by the Court against that department. The statutory duty is normally enforced by way of judicial review proceedings in the nature of mandamus by which the Court compels the satisfaction of a duty that has become due.

22. The nature and scope of the order of mandamus was discussed in **Republic v Kenya National Examinations Council ex parte Gathengi & 8 Others Civil Appeal No 234 of 1996** where the Court of Appeal cited, with approval, Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89 that:

The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although

there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.

23. This same issue was deliberated in the case of **Republic v Town Clerk, Kisumu Municipality ex parte East African Engineering Consultants [2007] 2 EA 441** where the court held as follows:

The orders are issued in the name of the Republic and in the case of mandamus order its officers are compelled to act in accordance with the law. The state so to speak by the very act of issuing the orders frowns upon its officers for not complying with the law. The orders are supposed to be obeyed by the officers as a matter of honour/and as ordered by the State. Execution as known in the Civil Procedure process was not contemplated and this includes garnishee proceedings. There is only one way of enforcing the orders where they are disobeyed i.e. through contempt proceedings.

24. In addition to the cost of the primary suit, a successful litigant is required to file a further suit in the High Court to seek an order of mandamus in the event the Government does not satisfy or honour the decree. The frustration that successful litigants undergo in trying to realize the fruits of their judgments against the Government was well articulated by Odunga J., in **Republic v Attorney General & Another ex parte James Alfred Koroso NRB HC JR Misc. Appl. No. 44 of 2012** where he observed that:

In the present case the ex parte applicant has no other option of realizing the fruits of his judgment since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgment that he has been awarded is realized. Unless something is done he will forever be left babysitting his barren decree.

25. Likewise in **Republic v Permanent Secretary of Water Resources Management & Development ex parte Akamba Timber and Hardware Limited MKS HC Misc. Civil Appl. No. 173 of 2004 [2006]eKLR**, Onyancha J., remarked as follows;

What happens where or when the court ignores to settle a decree and certificate of costs without lawful grounds. The decree holder has his rights to obtain the fruits of his judgement but he has no means of enforcing his such rights owing to statutory legal provisions which bar him from treating the Government as any other ordinary party against whom execution of a decree can issue!

In my view this position has made the Government departments adopt an attitude of carelessness in the manner they conduct themselves particularly where they are defendants. What is more unsatisfactory, however, is the conduct of the Attorney-General's office in relation to civil cases brought against the Government. More often than not, the Attorney-General's office will not file appearance or defence. Where by "good luck" such appearance if filed, defence will rarely be filed. Where even by great good luck the defence is filed, there will be no appearance or representation during the hearing of the suit. The result is that a judgement will be entered against the Government. The battle will however be only starting since the government will ignore requests to settle the resultant decree. That is why I believe, decree holders have recently resorted to the use of the superior order of Mandamus to secure a settlement from the Government. This is a very unsatisfactory state of affairs in respect to the Attorney General's office and may be a strong stand from the Attorney-General against the aforementioned negligence by his civil section officers may be necessary strongly called for. A different approach would be to remove protection against the government so that direct execution can proceed against it as it does against any other ordinary citizens.

26. The argument that the process of realizing a decree against the Government is complex, cumbersome and burdensome and therefore unconstitutional is not new and has been tested before in this jurisdiction. In the case of **Kisya Investments Ltd v Attorney General & Another (Supra)**, the High Court was faced with a similar application that sought a declaration that **section 21 (4)** of the **GPA** and the provisions of the Civil Procedure Rules restraining execution against the Government were unconstitutional under the provisions of **sections 84 (1) and 2(a), 70 (a), 60(1) and 72(1) (b), (c), (2) and (3)** of the former Constitution. In that case the court considered the rationale of these provisions and held that they did not

violate the former Constitution. Visram and Ibrahim JJ., (as they were) explained as follows;

History and rationale of Government's immunity from execution arises from the following: - Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i). The raising of revenue- (by taxation or borrowing); (ii). its expenditure; and (iii). The audit of public accounts. The satisfaction of decrees or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that section 32 of the Government Proceedings Act provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the moneys provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorised by statute, and any unauthorised payment may be recovered.

27. This court does not therefore seek to reinvent the wheel but to consider the case in light of the provisions of the Constitution that came into force in 2010. In so doing, this court will endeavor to consider each of the Constitutional provisions referred to in the petition which protect the fundamental rights of the petitioners against the aforesaid statutory provisions which are said to offend the same.

28. The petitioners' case is founded on the alleged violation of fundamental rights and freedoms guaranteed under the Constitution. The purpose of the procedure enacted in **Article 22** of the Constitution is to enforce fundamental rights and freedoms of the individual guaranteed under the Bill of Rights set out in **Part 2 of Chapter 4** of the Constitution.

29. Since the jurisdiction to enforce fundamental rights and freedoms in the Bill of Rights is a special jurisdiction, it follows that a party who invokes this special jurisdiction under **Article 22**, to enforce the bill of rights has a duty to set out clearly the articles or provisions it is claimed have been infringed or violated and show how these sections are infringed in relation to him. This principle has been established in a long line of cases since *Anarita K Njeru v Republic (No. 1)* [1979] KLR 261 which was decided under the former Constitution and confirmed by the Court of Appeal in *Mumo Matemu v Trusted Society for Human Rights Alliance & 5 Others* NRB CA Civil Appeal 290 of 2012 [2013]eKLR as being applicable to the Constitution.

30. The petitioners have invoked the provisions of **Articles 27, 28, 40** and **47** of the Constitution to argue that the provisions of **GPA** and **CPR** are unconstitutional and it is on this basis that this petition will be determined.

Right to equal protection and benefit of the law

31. **Article 27** of the Constitution provides for the right to equal protection and equal benefit of the law. It categorically prohibits discrimination on any grounds and it is intended to ensure that every individual is accorded equal treatment before the law.

32. The principle of equality and prohibition of discrimination is not absolute. The Constitution contemplates that there will be differentiation in certain circumstances. Hence in *Federation of Women Lawyers Fida Kenya & 5 Others v Attorney General & Anor* [2011]eKLR the court observed that:

In our view, mere differentiation or inequality of treatment does not per se amount to discrimination within the prohibition of the equal protection clause. To attract the operation of the clause, it is necessary to show that the selection or differentiation is unreasonable or arbitrary, that it does not rest on any basis having regard to the objective the legislature had in view or which the Constitution had in view. An equal protection is not violated if the exception which is made is required to be made by some other provisions of the Constitution. We think and state here that it is not possible to exhaust the circumstances or criteria which may afford a reasonable basis for classification in all cases.

33. Similar sentiments were expressed in **Pravin Bowry v Ethics & Anti-Corruption Commission (Supra)** where the court noted that:

I am in agreement and a Court, in my view, will uphold a law that targets a class so long as the legislative classification bears a rational relation to some independent and legitimate legislative end.

The court also cited with approval the case of **Romer v Evans Romer, Governor of Colorado et.al v Evans et al (94-1039) 517 U.S 620 1996** where the Court stated that:

In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group or if the rationale for it seems tenuous.

34. The question then is whether the rationale given for the immunity from the execution process given in the **Kisya Case (Supra)** is an acceptable basis for differentiating between the Government on one hand and the petitioners and other decree-holders on the other. We agree with the reasoning and rationale stated in the **Kisya Case**. This recognizes that due to the special role played and the central position held by the Government in the management of the affairs of the country, it is necessary for further proceedings to be undertaken before the judgment can be implemented.

35. Further the Constitution has not changed the manner in which monies are appropriated for specific purposes. Under **Article 206(2)** of the Constitution, money may be withdrawn from the Consolidated Fund only in accordance with an Act of Parliament.

36. We also agree with the basis for this differentiation so clearly explained in the minority judgment of Nkabinde J., in the **Nyathi Case (Supra)** as follows;

[141] It cannot be disputed that government functions differently from private individuals and legal entities and that it has no resources which are truly its own. As I have indicated, the special nature of the state, its legislative and executive processes and other relevant considerations as to how government functions, including its obligation to deal with limited state resources in the public interest, must be taken into account. As correctly pointed out by counsel for the respondents, there are mechanisms which apply to the administration of state resources, particularly as to how state funds are to be expended in order to ensure proper accountability.

[142] Section 3 is designed to prevent disruptions in the social fabric which may take place in the wake of attachments and executions against state assets. The High Court did not apply the test laid down in Prinsloo before making the finding of constitutional invalidity. In my view, the prohibition serves a legitimate governmental purpose. The disruption that would be caused by the attachment or execution of state property, especially in essential services such as health and state security, is too frightening to contemplate. For example, the realisation of the constitutional right of access to healthcare of members of the public would be severely compromised if public assets were to be attached. While it cannot be disputed that the prohibition on executing against state assets in favour of a judgment creditor places the latter at a comparative disadvantage, generally allowing attachment and execution of public assets may have disastrous consequences. It must be emphasised, furthermore, that the impugned section does make provision for the payment of any amount required to satisfy any judgment or order by the nominal respondent or defendant out of the National or Provincial Revenue Fund, as the case may be.

37. In our view and we find and hold that the rationale provided for the differentiation between ordinary litigants and the Government in the impugned provisions of the **GPA** and **CPR** is well founded and is not discriminatory. Further, there is no evidence that the petitioners have been afforded some differential treatment or different standards have been applied as against them in comparison to other persons in a similar situation.

38. At this juncture, we note that the petitioners relied heavily on the majority decision in *Nyathi Case (Supra)*. The majority of the court held that the provisions of **section 3** of the *State Liability Act 20 of 1957* which prohibited execution and attachment against any property of the State was unconstitutional on the ground that it unjustifiably violated the right to equal protection of the law, the right to dignity and right of access to justice. **Section 3** of the *Act* reads as follows:

No execution, attachment or like process shall be issued against the defendant or respondent in any such action or proceedings or against any property of the state, but the amount, if any, which may be required to satisfy any judgment or order given or made against the nominal defendant or respondent in any such action or proceedings may be paid out of the National Revenue Fund or a Provincial Revenue Fund as the case may be.

39. For the reasons we have set out above, we have found that the impugned sections of the **GPA** and **CPR** are not discriminatory. It is therefore not necessary to proceed to determine whether any limitation of the right is consistent with **Article 14** of the Constitution.

Right to property

40. The essence of **Article 40** of the Constitution is the protection of right to property. The petitioners claim that in so far as the impugned provisions of the **GPA** and **CPR** prohibit execution against the respondent, they are denied the fruits of their respective judgments which violates their right to property.

41. We do not read the provisions of the **GPA** and **CPR** to prevent the petitioners or other judgment creditors from realizing the fruits of their judgment. The provisions however require that the procedure laid out under the *Act* be followed so that the accounting officer may effect payment.

Right to fair administrative action

42. **Article 47(2)** of the Constitution requires that where a fundamental freedom has been or is likely to be adversely affected by an administrative action, the affected person has the right to be given written reasons for the action. The petitioners have not pointed out the nature of administrative action that the respondent has taken with regard to this matter which has affected their right. On the contrary, satisfaction of decrees against the Government is governed by the provisions of the **GPA**.

Right to dignity

43. **Article 28** of the Constitution protect the right to dignity. The petitioners contend that the impugned provisions of the **GPA** and **CPR** subject them to a life of penury, poverty and subjugation by the respondent. Although reference was made to this provisions, the petitioners did not show specifically how this right was violated or the fact that they have been subjected to indignity.

44. The right to dignity is an overarching right and applying it in this case we adopt the reasoning of the court in *Richard Dickson Ogendo and 2 Others v Attorney General and 5 Others NRB Petition no. 70 & 92 of 2014 [2014]eKLR* that;

*[45] Right to dignity is an interpretive principle to assist the further explication of the catalogue of rights and all rights have come to be seen as best interpreted through the lens of right to dignity (see *Dawood v Minister of Home Affairs [2000] (3) SA 936(CC)*). In my view, enforcement of the law that meets constitutional muster may lead to inconvenience but that by that fact alone is not a violation of a person's right to human dignity.*

45. On this score, we have reviewed the evidence and it has not been demonstrated that all or any of the petitioners before us have not been paid for want of compliance with any orders issued by the court directing the relevant accounting officer to effect payment.

Conclusion

46. While we agree that it is the duty of the State to provide an effective remedy, we do not think, as we are not persuaded that the petitioners have established a case to warrant grant of the relief sought. We are however not oblivious of the delay and cost caused by the procedures necessary to enforce a judgment against the Government. We hasten to point out that this case, unlike in the *Nyathi Case (Supra)*, was not argued on the basis of the right of access to justice protected under **Article 48** of the Constitution.

47. We however recommend that the Government establishes a Fund which will provide for funds to state organs which should be used to pay debts as a matter of statutory duty without recourse to orders of mandamus and contempt proceedings against accounting officers. The establishment of such a fund would be part of the State duty to promote, protect and facilitate compliance with **Article 48** of the Constitution.

Disposition

48. For the reasons we have set out above, we dismiss the petitioners' case.

49. Since the petitioners' case was not frivolous and was founded on public interest, we direct each party to bear their costs.

50. At this juncture, we wish to apologise for the delay in disposing of this matter which was caused by matters beyond our control. The initial bench that was constituted to hear the matter could not sit as the Presiding Judge was transferred. Thereafter and due to the appointment of the new Chief Justice, a new bench was constituted but one of the Judges was not based in Kisumu. After the bench was reconstituted to have all the High Court Judges in Kisumu, one of the judges was relocated to Siaya to hear election petitions after the hearing hence it was not possible to conference and render this decision on the original date scheduled. We thank the parties for their patience.

DATED and DELIVERED at KISUMU on this 21st of December 2017

D.S MAJANJA

E. MAINA

T. W. CHERERE

JUDGE

JUDGE

JUDGE

Mr Musomba instructed by Kulecho and Company Advocates for the petitioners.

Ms Lang'at instructed by the Office of the Attorney General for the respondent

Mr Onsongo instructed by Onsongo and Company Advocates for the Amicus Curiae.