REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

MILIMANI LAW COURT

MISCELLANEOUS CIVIL APPLICATION NO. 93 OF 2015

REPUBLIC…….....…….. APPLICANT

VERSUS

THE ATTORNEY GENERAL……...…….…..….. 1ST RESPONDENT

THE COUNTY SECRETARY

IN CHARGE OF CITY COUNTY OF NAIROBI..... 2ND RESPONDENT

EX-PARTE

STEPHEN WANYEE ROKI…….. APPLICANT

JUDGEMENT

Introduction

1. By a Notice of Motion dated 7th May, 2015, the *ex parte* applicant herein, **Stephen Wanyee Roki**, seeks an order of *mandamus* compelling the Respondents to pay the Decretal sum of Kenya Shillings Seventy Eight Million Seven Hundred And Nine Thousand One Hundred And Seventy Four Cents Ninety Five Only (Kshs 78,709,174.95/=) together with interest as ordered by the Court in civil case number 1 of 2011 in the High Court of Kenya at Nairobi Commercial and Admiralty Division. He also seeks an order for provision for costs.
2. According to the applicant, on or around March 2005 the then City Council of Nairobi invited tenders for various LASDAP projects and on behalf of MU Company S.Rocky General Contractors, the Applicant tendered for project no. 5PAP/CE/07/2005 - School Construction Enhancement Korogocho/Ngunyumu Primary School- Korogocho Ward whose deadline was 4th march 2005 and met the entire requirements and successfully won the tender. Thereafter, the Applicant consulted M/s K-Rep Bank Limited for the execution of Bid bond to execute the performance bond but the Bank declined upon which the Applicant executed the same through Invesco Insurance Limited Company Limited who also happened to be the insurers of Nairobi city council.
3. Since the Applicant needed financial support, he approached his bank M/s K-Rep Bank Limited who initially declined to fund the project arguing that the Nairobi City Council was not credit worthy but on being informed that the project was sponsored by D.F.I.D donors and that K.P.M.G

was the financial advisors and controllers and that the project monies were in special account operated differently from others in Nairobi City Council, M/s K-Rep Bank Limited agreed to fund the project only if certain conditions that they demanded were met, One of which was that they be given an undertaking by the project donors and managers that all payments accruing from the project would be paid to the contractor through his account with them. However, the donors were unable to give that undertaking considering that they were sponsoring the Nairobi City Council to be able to give the necessary services to the needy and that the City Council was the one responsible for the tender and to see it to its reasonable conclusion. The City Council of Nairobi on its part agreed to give a letter of irrevocable Authority to M/s K-Rep Bank Limited assuring them that all monies accruing from the project by them to the contractor would be paid through them unless the same was cancelled by the bank. Accordingly, the letter was granted.

4. It was averred that M/s K-Rep Bank Limited then hired Pinacle Projects to oversee all monies disbursed to the contractor was in essence used for the furtherment of the project. Further, Pinnacle Projects subcontracted Mutie & Associates who continued to oversee the project on behalf of M/s K-Rep Bank Limited through their appointed agents Pinacle Projects and they used to do valuations of work done before any disbursement of any money by M/s K-Rep Bank Limited and so the Bank was always on an up to date position with the progress of the project.
5. It was averred that the first disbursement was Kshs 300,000/= which kick started the project and did not require any valuation before being availed and that the Applicant was given possession of the site on the 12th may 2006 and the contract was stipulated as twenty weeks expiring on 13thOctober 2006. He commenced work using funds from the said Bank and presented the 1st valuation to the City Council on 11th august 2006 for payment amounting to Kshs 1,459,125.20. However, by 12th October 2006 the payment had not been paid despite the stipulated period where the Applicant was forced to write a letter of complaint to the City Council upon which payment was effected later but re-valued downwards to Kshs 1,313,153.43.
6. It was averred that the Applicant further presented another valuation and attached a valuation done by Mutie & Associates through instructions from Pinacle Projects the agents of K-Rep Bank. It was was contended that this state of affairs worsened his relationship with the applicants.
7. It was the foregoing that prompted the applicant file Civil Case Number 1 of 2011 in the High Court of Kenya at Nairobi Commercial and Admiralty Division – **Stephen Wanyee Roki vs. K-Rep Bank Limited & 2 Others** (hereinafter referred to as "the Civil Suit") in which judgment was entered and a preliminary decree to that effect issued ordering the City County of Nairobi to pay the sum of Kenya shillings Seventy Eight Million Seven Hundred and Nine Thousand One Hundred and Seventy Four Cents Ninety Five (Kshs 78,709,174.95/=) together with interest at the rate of 38.5% per annum among other orders. However despite service of the said Decree upon the 2nd Respondent, the 2nd respondent failed, neglected and or refused to pay the said amount necessitating this Application.
8. According to the applicant, the allegation that the Nairobi City County is not suited is not true having inherited all the assets and liabilities of the defunct Nairobi City County. To him, the pendency of HCCC No. 1 of 2011 should not hinder the Applicant herein as the preliminary decree is clear as it is of a monetary nature and is not dependent on the further proceedings. In his view, the mere existence of the application to set aside is not good enough to oppose this application as no stay orders have been granted and therefore this application should proceed to logical conclusion.

2nd Respondent's Case

9. In response to the application, the 2nd Respondent contended that it was non-suited as it was not in existence at the time the alleged transaction took place. It was its position that the defunct Nairobi City Council and its successor, the Nairobi City County are statutory bodies with the ability to sue and be sued in their respective capacities.
10. It was contended that the orders sought herein ought not to be granted as the Civil Suit is still alive and ongoing before **Hon. Justice Fred Ochieng** wherein the 2nd Respondent's advocates applied for setting aside the default judgement and the preliminary decree and which application had been set down for hearing on 13th July, 2015 on which date the ex parte applicant sought for time to

respond to the application. It was contended that the applicant had never opposed the said application which was the set down for hearing on inter partes on 5th October, 2015 but was not listed. However the 2nd Respondent's advocates had taken the steps to trace the said file.

11. It was the 2nd Respondent's case that the Civil Court that granted the orders to subject of these proceedings is vested with the jurisdiction and powers to enforce its own orders hence the filing of these proceedings is an abuse of administrative law as the dispute remains a commercial dispute which is outside the province of judicial review proceedings.
12. It was further contended that the underlying commercial transaction was not against the 2nd Respondent and there was no proper substitution of parties as to properly direct the subject proceedings against the 2nd Respondent. It was further contended that the claim sought to be enforced has never been lodged with nor vetted or audited by the Transitional Authority as required under the ***Transition to Devolved Governments Act*** before the same qualifies for payment.
13. According to the 2nd Respondent, this Court is being invited to act in vain or in a manner that is likely to issue conflicting orders to the concurrent Division of the High Court properly seized of the subject matter. It was further contended that he 2nd Respondent is sought to be attached on a decree it was not a party to and in which it was never heard.
14. It was the 2nd Respondent's position that there does exist elaborate execution procedures under the ***Civil Procedure Act*** and the ***Rules*** thereunder which the applicant had not invoked.
15. The 2nd Respondent therefore urged the Court to dismiss the application.

Determination

16. According to the 2nd Respondent, Civil Court that granted the orders to subject of these proceedings is vested with the jurisdiction and powers to enforce its own orders. It was further contended that there does exist elaborate execution procedures under the ***Civil Procedure Act*** and the ***Rules*** thereunder. This brings to fore the issue whether normal execution proceeding can be undertaken against a County Government.
17. Section 21(4) of the ***Government Proceedings Act*** provides:

> ***Save as aforesaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as aforesaid, 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.***

18. The question is whether this provision applies to County Governments or only to National Government. The above Act does not define the term "Government". Nor does such definition appear in Article 258 of the Constitution. Section 2 of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya on the other hand provides:

> ***"the Government" means the Government of Kenya***

19. Article 189(1)(a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.
20. Although the provisions of the Government Proceedings Act do not expressly refer to County Governments, section 7 of the Sixth Schedule to the Constitution (Transitional And Consequential Provisions) provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

21. It follows that the provisions of the Government Proceedings Act, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the Constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to execution proceedings.
22. The rationale for the Government's immunity against execution in the normal manner was explained by **Ibrahim** and **Visram, JJ** (as they were) in **Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74**, as hereunder:

> **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 judgements 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…As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that Parliament is very jealous of its control over the expenditure and this is as it should be. No Ministry or Department has any ready funds at all times to satisfy decrees or judgements. While existence of claims and decrees may be known to the Ministries and Departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the Government expenditure…The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inudated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer. No Government can possibly survive such an onslaught. The Government and therefore the State operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but it's Constitutional and Statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the Law that prohibits execution against and attachment of the Government assets and property."**

23. The importance of the devolved system of governance was appreciated by the Supreme Court in **Speaker of The Senate & Another vs. Hon. Attorney-General & Another & 3 Others Advisory Opinion Reference No. 2 of 2013 [2013] eKLR** in which **Mutunga, CJ** expressed himself as follows:

> **"The current devolution provisions in Chapter 11 of the new Constitution are a major shift from the fiscal and administrative decentralisation initiatives that preceded it. It encompasses elements of political, administrative and fiscal devolution. There is a vertical and horizontal dispersal of power that puts the exercise of State power in check... Devolution is the core promise of the new Constitution. It reverses the system of control and authority established by the colonial powers and continued by successive Presidents. The large panoply of institutions that play a role in devolution-matters, evidences the central place of devolution in the deconstruction-reconstruction of the Kenyan state..."**

24. The learned President of the Supreme Court continued:

> **"Given Kenya's history, which shows the central government to have previously starved decentralized units of resources, the extent to which the Constitution endeavours to guarantee a financial lifeline for the devolved units is a reflection of this experience and, more specifically, an insurance against recurrence. Indeed, in practically all its eighteen Chapters, only in Chapter Twelve (on public finance with respect to devolution) does the Constitution express itself in the most precise mathematical language. This is not in vain. It affirms the "constitutional commitment to protect"; and it acknowledges an inherent need to assure sufficient resources for the devolved units...Article 96 of the Constitution represents the *raison d'être* of the Senate as "to protect" devolution. Therefore, when there is even a scintilla of a threat to devolution, and the Senate approaches the Court to exercise its advisory jurisdiction under Article 163 (6) of the Constitution, the Court has a duty to ward off the threat. The Court's inclination would not be any different if some other State organ approached it. Thus, if the process of devolution is threatened, whether by Parliamentary or other institutional acts, a basis emerges for remedial action by the Courts in general, and by the Supreme Court in particular... It is relevant to consider the range of responsibilities shouldered by these nascent county governments. The Bill of Rights (Chapter 4 of the Constitution) is one of the most progressive and most modern in the world. It not only contains political and civil rights, but also expands the canvas of rights to include cultural, social, and economic rights. Significantly, some of these second-generation rights, such as food, health, environment, and education, fall under the mandate of the county governments, and will thus have to be realized at that level. This means that county governments will require substantial resources, to enable them to deliver on these rights, and fulfil their own constitutional responsibilities… National values and principles are important anchors of interpretive frameworks of the Constitution, under Article 259 (a). *Devolution* is a fundamental principle of the Constitution. It is pivotal to the facilitation of Kenya's social, economic and political growth, as the historical account clearly indicates. In my view, the constitutional duty imposed on the Supreme Court to promote devolution is not in doubt. The basis of *developing rich jurisprudence on devolution* could not have been more clearly reflected than in the provisions of the Constitution and the *Supreme Court Act.*"**

25. The objects of devolution of Government are provided under Article 174 of the Constitution as follows:

> **(a) to promote democratic and accountable exercise of power;**
>
> **(b) to foster national unity by recognising diversity;**

(c) to give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

(d) to recognise the right of communities to manage their own affairs and to further their development;

(e) to protect and promote the interests and rights of minorities and marginalised communities;

(f) to promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

(g) to ensure equitable sharing of national and local resources throughout Kenya;

(h) to facilitate the decentralisation of State organs, their functions and services, from the capital of Kenya; and

(i) to enhance checks and balances and the separation of powers.

26. It is therefore clear that the importance of devolution of Government cannot be underestimated. It is therefore not by coincidence that sharing and devolution of power is recognised as one of the national values and principles of governance in Article 10 of the Constitution. This Court must therefore protect devolution and promote its principles. It must actions which are likely to onslaught on the Couty Government and grind its operations to a halt and paralyse it from realising and fulfilling its Constitutional mandate. It is therefore my view and I hold that the extent of the immunity granted to the under section 21(4) of the Government Proceedings Act must necessarily extend to the County Governments.
27. That being the position, execution under the Civil Procedure Rules is bared in so far as the County Governments re concerned. What then is the option available to a party in whose favour judgement has been decreed? In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as hereunder:

"…in the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but

merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

28. It follows that the only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus compelling the County Government to settle the decree in question.
29. The Respondent contended that since it is not he local authority against whom the judgement was entered it ought not to be compelled to satisfy the decree issued against the defunct local authority. Section 15(1) of the Sixth Schedule of the Constitution obliges Parliament to legislate for the phased transfer, over a period of not more than three years from the date of the first election of county assemblies, from the national government to county governments of the functions assigned to them under Article 185 of the Constitution. However as was held in JR 366 of 2014 – **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others -** Article 185 deals with legislative authority of county assemblies. Accordingly, the legislation contemplated under the said section 15 deals only with the phased transfer of the legislative functions of the county assemblies. It is true that section 6 of the Sixth Schedule to the Constitution provides that all rights and obligations however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under the Constitution. However, those rights and obligations are expressly stated to be subject to contrary provisions in the Constitution. Section 33 of the sixth schedule, on the other hand provides:

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

30. According to **Kasango, J** in **Argos Furnishers Ltd vs. Municipal Council of Mombasa HCCC No. 13 of 2008,** a decision 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."

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

Constitution. The former provides:

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

32. The learned Judge accordingly found that:

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

33. It follows that section 33 of the 6th Schedule is an exception to section 6 thereof hence legal rights and liabilities of the defunct local authorities are to accrue in favour of and be sustained against their successors which in this case are the respective County Governments and not the National Government.
34. It was further contended that the claim cannot be enforced before it is lodged with, vetted or audited by the Transitional Authority as required under the ***Transition to Devolved Governments Act***. Whereas the Transitional Authority is empowered to develop the criteria as may be necessary to determine the transfer of functions from the national to county governments, there was an exception provided by section 33 of the Sixth Schedule hence the settlement of decrees against the defunct local authorities is not a function of the national government. The Court appreciates that under section 35 of the ***Transition to Devolved Government Act, 2012,*** a state organ, public office, public entity of local authority (defunct) is barred from transferring assets or liabilities during the transition period without seeking approval of the Authority. A moratorium issued under the said Act was the subject of the decision in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which the Court expressed itself as follows:

> **"In this case not only has a judgement been given in favour of the ex parte applicant, but this Court has gone ahead to grant an order of mandamus compelling the respondent to satisfy the decree in question since execution proceedings cannot issue against the respondent. There is nolonger a question of verifying the liabilities which seems to have been the Authority's concern in the said notice."**

35. Whereas the Court in **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others** (supra) appreciated that the said section forbids the transfer by a State organ, public office, public entity or local authority of assets and liabilities during the transition period, the Court was not prepared to interpret that section to mean that payment of debts accrued by the defunct local authorities which devolve or are transmitted to the relevant County Governments amount to transfer of assets and or liabilities and associated itself with the holding of **Majanja, J** in **Republic vs. Town Clerk of Webuye County Council & Another** (supra) that:

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

the Applicant's right of access to justice protected under Article 48 of the Constitution."

36. Similarly, in this case we are dealing with the duty to pay a debt already decreed by a competent Court of law to be due and payable by the defunct local authority which liability has been statutorily and constitutionally inherited by the County Government.

37. The 2nd Respondent contended that since it has applied for setting aside the Judgement, to grant the orders sought herein during the pendency of the said application may well embarrass the proceedings before the two Tribunals seized of the two matters. In **Republic vs. Kenya National Examinations Council *ex parte* Gathengi & 8 Others Civil Appeal No 234 of 1996, the Court of Appeal cited, with approval, *Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89*** thus:

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

38. As I have already found hereinabove, by virtue of section 21(4) of the ***Government Proceedings Act***, Cap 40 Laws of Kenya, the applicant has no other appropriate remedy except *mandamus*. That was the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743, Lord Goddard C. J.** said:

> ***"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. "***

39. In **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants [2007] 2 EA 441,** it was held:

> **"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. The applicant should therefore have enforced the *mandamus* order using this method. There is only one rider – an officer can only be committed where the public body he serves has funds and where he deliberately refuses to pay or where a statute has earmarked funds for payment since an officer does not incur personal liability...Local Authorities Transfer Fund Act, which provides funds to local authorities, part of which should be used to pay debts does not provide for their attachment since section 263A of the Local Government Act prohibits it. It just enables the Local Authorities to honour their debt obligations including those covered by a mandamus order. The Local Authorities have to pay as a matter of statutory duty or in the case of mandamus in obedience to the order from the state or the Republic. There is no provision in the LATF Act for attachment or execution".**

40. That was the position in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743,** in which **Lord Goddard C. J.** held:-

"It is important to remember that "mandamus" is neither a writ of course nor a writ of right, but that it will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy. This court has always refused to issue a mandamus if there is another remedy open to the party seeking it. This is one of the reasons, no doubt, why, where there is a visitor of a corporate body, the court will not interfere in a matter within the province of the visitor, and especially this is so in matters relating to educational bodies such as colleges."

41. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, expressed himself, *inter alia*, as follows:

> **"*Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature…In cases where there is a duty of a public or quasi-public nature, or a duty imposed by statute, in the fulfilment of which some other person has an interest the court has jurisdiction to grant *mandamus* to compel the fulfilment…The foregoing may also be thought to be much in point in relation to the applicant's unsatisfied judgement which has been rendered valueless by the refusal of the Treasury Officer of Accounts to perform his statutory duty under section 20(3) of the Government Proceedings Act. It is perhaps hardly necessary to add that the applicant has very much of an interest in the fulfilment of that duty…Since *mandamus* originated and was developed under English law it seems reasonable to assume that when the legislature in Uganda applied it to Uganda they intended it to be governed by English law in so far as this was not inconsistent with Uganda law. Uganda, being a sovereign State, the Court is not bound by English law but the court considers the English decisions must be of strong persuasive weight and afford guidance in matters not covered by Uganda law…English authorities are overwhelmingly to the effect that no order can be made against the State as such or against a servant of the State when he is acting "simply in his capacity of servant". There are no doubt cases where servants of the Crown have been constituted by Statute agents to do particular acts, and in these cases a *mandamus* would lie against them as individuals designated to do those acts. Therefore, where government officials have been constituted agents for carrying out particular duties in relation to subjects, whether by royal charter, statute, or common law, so that they are under a legal obligation towards those subjects, an order of *mandamus* will lie for the enforcement of the duties…With regard to the question whether *mandamus* will lie, that case falls within the class of cases when officials have a public duty to perform, and having refused to perform it, *mandamus* will lie on the application of a person interested to compel them to do so. It is no doubt difficult to draw the line, and some of the cases are not easy to reconcile… It seems to be an illogical argument that the Government Accounting Officer cannot be compelled to carry out a statutory duty specifically imposed by Parliament out of funds which Parliament itself has said in section 29(1) of the Government Proceedings Act shall be provided for the purpose. There is nothing in the said Act itself to suggest that this duty is owed solely to the Government…Whereas *mandamus* may be refused where there is another appropriate remedy, there is no**

discretion to withhold *mandamus* if no other remedy remains. When there is no specific remedy, the court will grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*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."

42. What comes out clearly from the foregoing is that the Court only compels the satisfaction of a duty that has become due. 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 the exact sums payable, the Court will not by an order of mandamus compel the Respondent to exercise that duty until the dispute is sorted out since the decision whether or not to grant an order of mandamus is an exercise of discretion which must be exercised on sound legal principles. In my view where there is a genuine application pending whose result may upset the decision sought to be implemented by mandamus the Court may well be inclined to await the termination of the said application before granting the orders of mandamus in order not to find itself in an untidy situation where an order of mandamus is issued in respect of a judgement which may well be set aside. As was appreciated in **Newton Gikaru Githiomi & Anor vs. AG/Public Trustee Nairobi HC JR 472 of 2014 it was submitted that:**

"It must be remembered that judicial review orders are discretionary. Since they are not guaranteed, a court may refuse to grant them even where the requisite grounds exist since the court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining. Further, as the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and would refuse to grant judicial review remedy when it is no longer necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised."

43. In my view, it would make sense to await the determination of the application seeking to set aside the judgement which gave rise to these proceedings before continuing with these proceedings.
44. However as was appreciated in **Republic vs. The Attorney General & Another ex parte James Alfred Koroso** (supra):

"In an application for *mandamus* the Court can only compel the Respondent to undertake the duty imposed by the judgement and not anything else. It is not upon the Court determining an application for an order of *mandamus* to determine the intention of the Judge who granted the decree being enforced. Any such determination ought to be sought in the original suit and not in the application for enforcement thereof."

45. In the premises in the exercise of my discretionary powers I decline to grant the orders sought herein at this stage. Accordingly, this application fails and is struck out. The applicant is however at liberty to seek the same prayers if the application for setting aside the judgement fails.
46. The costs of these proceedings are however awarded to the applicant to be borne by the 2nd Respondent.

Dated at Nairobi this 23rd day of February, 2016

G V ODUNGA

JUDGE

Delivered in the absence of the parties

Cc Patricia