



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 390 OF 2014

**IN THE MATTER OF AN APPLICATION TO SEEK LEAVE TO COMMENCE
PROCEEDINGS IN THE NATURE OF JUDICIAL REVIEW FOR AN ORDER OF
MANDAMUS**

AND

**IN THE MATTER OF THE CIVIL PROCEDURE ACT, CAP 21 LAWS OF KENYA, IN THE
MATTER OF THE LAW REFORM ACT, CAP 26 LAWS OF KENYA**

AND

**IN THE MATTER OF AN APPLICATION FOR THE ENFORCEMENT OF AN ARBITRATION
AWARD DATED 5TH NOVEMBER 2009 AND AN AWARD ON THE ASSESSMENT OF COSTS
DATED 21ST JANUARY 2011 BOTH ADOPTED BY THE HIGH COURT AS A COURT
JUDGMENT ON 13TH DECEMBER 2011.**

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

KILIMANJARO SAFARI CLUB LTD..APPLICANT/DECREE HOLDER

VERSUS

COUNTY COUNCIL

OF OLKEJUADO.....RESPONDENT/JUDGMENT/DEBTOR

TO:-

KAJIADO COUNTY.....1ST RESPONDENT

MORRIS PUTITAKA (Chief

Officer - Finance & Economic

Planning - Kajiado County).....2ND RESPONDENT

KESWEMAPENA (County Executive

Committee Member - Finance &

Economic Planning - Kajiado County).....3RD RESPONDENT

JUDGMENT

Introduction

1. By a Notice of Motion dated 20th November, 2014, the applicant herein, **Kilimanjaro Safari Club Ltd**, seeks the following orders:
1. **That an order of mandamus to issue to compel the Kajiado County and specifically the Chief Officer – Finance and Economic Planning, Mr. Morris Putita Kaaka, and the County Executive Committee Member, Keswe Mapena to satisfy the decree and certified costs issued by the High Court herein on 13th December 2011.**
2. **That the costs of this application be borne by the Respondent in any event.**
3. **That this honourable court be pleased to give all necessary directions.**

Applicant's Case

2. According to the applicant, it is the beneficiary of a final Arbitral Award delivered by **John M. Ohaga** on 5th November 2009 and an Award on assessment of costs on the 21st January 2011 which award was adopted as an order of this Court on 13th December 2011.
3. The said award, it was averred was disputed by the Judgement Debtor herein by way of an Appeal which Appeal is yet to be heard and determined. Pursuant thereto the said judgement debtor applied for stay of execution thereof pending the said appeal which stay was granted on condition that the Judgment Debtor do deposit a third of the Decretal amount in a joint interest earning account in joint names of itself and the Applicant herein, within 45 days as from 30th May 2013. The said period of 45 days, however lapsed and attempts at execution proved unsuccessful though the decretal amount still remains unsettled.
3. It was contended by the applicant that leave to file this application was granted on 11th November 2014 and the Respondents were served as per Order 53 of the **Civil Procedure Rules** (Cap 21). It was further averred that the Respondents have all along been aware of the Arbitration Award, Order and Costs which are the basis of this application, and the 1st Respondent has made specific reference to it via the Affidavit Sworn by the County Secretary. Further, not only are the Respondents aware of the Arbitration Award and the Order, they instructed an advocate to oppose the Applicant's application dated 26th April 2011 seeking to have the awards adopted and on losing the said application they filed a Notice to Appeal. Additionally, the 1st Respondent filed an application dated 2nd March 2012 in Court seeking Stay of Execution of the Order herein which application was allowed on condition that the 1st Respondent deposits a third of the Decretal amount or Kshs 105 Million in an interest earning account in joint names of itself and the Applicant herein, within 45 from the date of the Ruling. The applicant was therefore perplexed by the Respondents' claim that they were not aware of the order yet they applied to stay it.
4. It was however the Applicant's case that as to date there is no Appeal filed against the main Arbitration Award and no Stay of Execution against the Decree extracted, the Applicant is free to seek enforcement of the same. The Applicant disclosed that despite sufficient demand made the Respondents have neither settled the amounts due nor complied with the court order to deposit 1/3 of the amounts due or heed the Court's advice to settle all the amounts due. The Respondent's action, according to the Applicant shows that they will not settle the full amount.

5. The Applicant disclosed that the Transitional Authority vide letter dated 10th June 2013 wrote to the County Secretary, the deponent of the affidavit on behalf of the 1st Respondent herein informing them that they had received the Ruling of the Court (dated 30th May 2013) and instructing the County secretary to deal accordingly as the successors Ol Kejuado County Council.
6. In the Applicant's view, the ruling of the Court dated 13th June 2014 annexed to the Respondent's Replying Affidavit was as a result of the Applicant seeking to join the Governor of the County Council as a party to the suit and instituting garnishee proceedings in execution. In the said Ruling the Court finding was that the County Government and Governor were protected under the **Government Proceedings Act** (CAP 13 of the Laws of Kenya) and that the Applicant could not attach the County accounts by way of garnishee. The Court however found that the County Council of Ol Kejuado was succeeded by the County Government of Kajiado and the proceedings against the latter were sustainable; that the 1st Respondent owes the Applicant the monies in the decree and did not deny this; that the Respondents had not denied failing to comply with the Court Orders issued on 30th May 2013. To date the same are not denied.
7. The Applicant averred that having relied on the protection of the **Government Proceedings Act** the Respondents cannot be heard to claim this application is not proper as this is the only way one can seek enforcement of the Order against the Government.
8. While acknowledging that the Applicant had filed a Notice of Appeal against the said ruling of **Hon. Justice Ogola** dated 13th June 2014, the Applicant contended that it had neither filed any Appeal nor pursued any Appeal to date hence the Ruling still stands unchallenged.
9. The Applicant disclosed that by a press release published in the *Daily Nation* on 29th January 2015, the National Government had released to Kajiado County Kshs 1.7 Billion and that the County had in its bank balances of over Kshs 1Billion currently hence was clearly in a position to settle the decretal amount and more so it was able to weather any blow they claim settlement of the decretal sum will bring. The Applicant on the other hand was unable to restore its lodge back to working conditions and the same remained closed for over eight (8) years now as a result of which the Applicant had been suffering financial losses daily since 2007; the situation being quite desperate now.
10. To the Applicant, it is in the public interest of the Residents of Kajiado County that the decretal sum herein is settled without further delay as their economic prospects would be improved through job creation, increased revenue collection and attracting investors to the County. Similarly, it will boost potential investor's confidence.
11. The applicant averred that the Kajiado County and specifically Kajiado's Chief Officer and County Executive Committee Member for Finance and Economic Planning have since assumed all their functions, roles, duties, liabilities of the County Council of Ol Kejuado, the judgement debtor and since they are in charge and responsible for ensuring the Court Order and Decree are satisfied they should be compelled to do so within 14 days of the Court issuing the order as they have neglected to do so to date.
12. The applicant averred that it continued to suffer financial loss every day it is unable to realize the just rewards of the Judgment as the livelihood of the shareholders of the Applicant have been adversely affected as a result and continues to deteriorate every day the decretal sums are not paid hence this application.

Respondents' Case

13. The Respondents opposed the application. According to it, the application is unfounded, baseless and altogether an abuse of the court process. To the Respondents, the application is fatally defective as no leave to seek prerogative orders was sought before the substantive application was made.
14. The Respondents asserted that there was no judgment against County Government of Kajiado and they have never been served with any decree and none has been annexed to the Notice of Motion. Further, the county government of Kajiado has never been enjoined (sic) in these proceedings or any proceedings related thereto. The Respondents however disclosed that the Applicant had initially field an application seeking *inter-alia* orders to join the Kajiado County Government as a party to this proceedings, which application was dismissed on 13th June 2014. Six days later, the

- Applicant filed a Notice of Appeal against the dismissal order. To the Respondents, the Applicant has not challenged that decision and is now seeking similar orders through the back door.
15. In their view, there are pertinent issues to be raised on appeal including, but not limited to the fact that the defunct authority was actually owed arrears running years by the Applicant.
 16. It was their position that the County Government of Kajiado had since not been joined as a party to these proceedings as by law required especially considering that the applicant is seeking execution.
 17. The Respondent averred that the Applicant completely misconceived the *Press Release on The Release Of The 4th and 5th Tranche of The Equitable Share of Revenue to County Governments Pursuant to County Allocation of Revenue Act 2014*. To them, the amounts referred to especially the 734 million, were figures already committed as per the County Budget for the financial year 2014/2015. On the other hand the amount of Kshs.165,313,023.00 was requested from the comptroller of budget for salaries and operations of the county government as well as emergency funds, while Kshs.111,596,007.00 is meant for development projects for the current year. All this is a very small fraction of the 1.8 billion current financial year estimates.
 18. The Respondents therefore denied that the County Government of Kajiado had Kshs.1,011,168,622.00 just lying in the account as every single coin was committed and was strictly accounted for.
 19. The Respondent averred that the County Government of Kajiado was a law abiding entity and aware of this colossal award it requested the Transition Authority on authority on 27th February 2014 to help provide guidance. On 29th January 2014 the chairman, Transition Authority wrote back indicating that liabilities such as this are subjected to the scrutiny of the auditor general for verification and advice. However, as this has not happened yet, this Court was urged to give these verification avenues a chance.

Interested Party's Case

20. The Interested Party herein, Attorney General, filed the following grounds of opposition:

1. **Judicial review orders are issuable only in the name of the state.**
2. **Judicial review orders can only be issued subject to the Applicant obtaining leave to seek orders sought which leave has not been granted in the present application.**
3. **That the Respondents are a totally different entity from the judgment debtors in issue.**
4. **That there has been no declaratory suit that has determined whether the Respondents are liable to the Applicant and the extent of such liability since the allegedly liability is alleged to be by operation of law and contingent on ascertaining of factual matters of transfer of assets and liabilities.**
5. **That there are pending proceedings before a court of competent jurisdiction on the issue as to whether the Respondent County should be substituted of the defunct county council.**
6. **That the present proceedings are premised on the assumption that all counties are successors in title to defunct local authorities which assumption is inaccurate since not all counties were crafted along the geographical delimitations of defunct local authorities and further there was no direct transfer of assets between local authorities and counties that would support such presumption.**
7. **That judicial review proceedings are summary proceedings which do not envisage a trial by law of viva voce which is necessary to determine the transfer of assets and commensurate liabilities.**
8. **That the issuance of judicial review orders is discretionary, which discretion should be exercised within the peculiar circumstances of each case and the present case where liability is being challenged, there are parallel but relevant proceedings in before a court of concurrent jurisdiction, there are appellate proceedings initiated by the Applicant and the claim is to be settled from public funds.**
9. **That judicial review orders cannot be issued against private individuals as sought by the Applicant herein.**
10. **That arbitral proceedings are civil proceedings and this honourable court lacks the jurisdiction to issue judicial review orders in civil proceedings by dint of the provisions of**

the Law Reform Act.

11. **That the verifying affidavit of Sandeep R. Desai contains no facts of probative value that would support the issuance of the orders sought.**
 12. **That the order sought in the notice of motion application is at variance with the one sought in the statement of facts and cannot be issued pursuant to the provisions of Order 53 of the civil Procedure Rules.**
 13. **That the application is bad in law.**
21. In the Respondent's view that this application ought to be dismissed with costs.

Determinations

22. I have considered the issues raised in this application. The issues which are the subject of these proceedings are not novel. These issues were dealt with by this Court before in JR 366 of 2014 – **Gateway Insurance Company Limited vs. Treasurer Nairobi County Government & 2 Others** in which the Court dealt extensively with the issues raised by the Respondent herein.
23. In that case the Court analysed section 15(1) of the Sixth Schedule of the Constitution which 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 and found that Article 185 deals with legislative authority of county assemblies. Accordingly, the Court held that the legislation contemplated under the said section 15 deals only with the phased transfer of the legislative functions of the county assemblies.
24. It was contended that since the County Government of Kajiado had not been substituted in place of the County Council of Kajiado the orders of mandamus cannot issue against the latter.
25. 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.

26. 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.”

27. **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 filed 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.

28. 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 ex parte Geoffrey Gathenji Njoroge & Others CA Civil Appeal No. 266 of 1996).”

29. 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. 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.
30. In my view the foregoing provisions and authorities have the deeming effect in that the County Governments are deemed, for the purposes of the aforesaid provisions to be the defunct local authorities. What then does the term “deem” legally connote. In **Telkom Kenya Ltd vs. Jeremiah Achila Gogo & Another Civil Appeal No. 153 of 2004**, the Court of Appeal expressed itself as follows:

“The word “deemed” is used a great deal in modern legislation – sometimes it is used to impose for purposes of a statute an artificial construction of a word or phrase that would otherwise not prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain – sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible... It was not necessary to move court to substitute the new bodies in place of KPTC because L.N. 132 of 2001, brought in Telkom Ltd into the case which otherwise would have been excluded although it would have been prudent and indeed better if an application had been made for the purposes of obviating confusion to make Telkom Ltd a party and the duty to do so lay on both parties. The appellant should not think that it was only incumbent upon the respondent to make the application. It, too, was obliged to apply more so, because it wanted to challenge the decision of the Superior Court against it...The failure to apply did not vitiate any action so far taken since the actions are deemed to have been taken against the correct party...Order 23 rule 9 of the Civil Procedure Rules deals with situations where a litigant has died, has become bankrupt or there has been marriage of parties, none of which situations arise here.”

31. In that case Kenya Posts & Telecommunications Corporation was split into two – Telkom and Postal Corporation. The case concerned the liabilities of Kenya Posts & Telecommunications Corporation which had been taken over and deemed to be the liabilities of Telkom. Similarly, in this case the liabilities of the defunct local authorities are constitutionally deemed to be the liabilities of the County Governments. It follows that no other procedure is necessary in order to compel the County Governments to meet the said obligations. Accordingly, the issue of applying for substitution does not arise in such circumstances. This position was made clear to the Respondents herein in Nairobi HCMisc.Appli. No. 442 of 2011 – **Kilimanjaro Safari Club Limited vs. The Governor – Kajiado County & Others** – where **Ogola, J** expressed himself as follows:

“It is evident that the County Council of Ol Kejuado has a successor and assign that has taken over its functions after the repeal of the Local Government Act and subsequently the elections. This is the County Government of Kajiado. Therefore, the proceedings herein are sustainable against the said County Government.”

32. The Respondent ought to have been properly advised from the said decision.

33. The Respondent also relied on the provisions of the *Transition to Devolved Government Act, 2012* which stipulates that a state organ, public office, public entity or local authority (defunct) shall not transfer assets or liabilities during the transition period without seeking approval of the Authority. A moratorium given pursuant to 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 no longer a question of verifying the liabilities which seems to have been the Authority’s concern in the said notice.”

34. 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.”

35. 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.

36. This Court dealt with this duty robustly in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between Republic vs. The Attorney General & Another ex parte James Alfred Koroso as follows:

“...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 no longer 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."

37. In this case there was an application pending appeal which was granted on conditions but it seems that the said conditions were not complied with within the stipulated period or at all. The stay accordingly died a natural death. It follows that on the lapse of the 45 days given by the Court, the stay lapsed and therefore there is no order of stay in place.

38. In the circumstances, the reasons advanced by the Respondents for the failure to satisfy the decree are flimsy excuses meant to deny the applicants the fruits of its judgement and I have no reason to decline to grant the orders sought herein. This Court appreciates that most of the County Governments are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up and that taking into account their debt portfolio as against their financial resources, it is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. That recognition however does not justify the County Governments to evade meeting their constitutional and statutory obligations owed to other people. Such a consideration can only be taken into account when the Court is determining the mode of the settlement of the said obligations. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations.

39. An issue was raised with respect to intitlement of these proceedings. It is clear that these proceedings were improperly intitled. Instead of the same being instituted in the name of the Republic as is the procedure in judicial review proceedings, the applicant herein is indicated as Kilimanjaro Safari Club Limited, the ex parte applicant herein. In Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 486 the court expressed itself on the issue as follows:

"Prerogative orders are issued in the name of the crown and applications for such orders must be correctly intitled and accordingly, the orders of *Certiorari*, *Mandamus* or *Prohibition* are issued in the name of the Republic and applications therefore are made in the name of the Republic at the instance of the person affected by the action or omission in issue and the proper format of the substantive motion for *Mandamus* is: -

“REPUBLIC.....APPLICANT

V

THE ELECTORAL COMMISSION OF KENYA.....RESPONDENT.

EX PARTE

40.The rationale for this was given in Mohamed Ahmed vs. R [1957] EA 523 where it was held:

“This recital reveals a series of muddles and errors which is not unique in Uganda and is attributable to laxity in practitioners’ offices and in some registries of the High Court. The appellant’s advocate appears to have failed entirely to realise that prerogative orders, like the old prerogative writs, are issued in the name of the crown at the instance of the applicant and are directed to the person or persons who are to comply therewith. Applications for such orders must be intituled and served accordingly. The Crown cannot be both applicant and respondent in the same matter”.

41.Nevertheless, in Republic Ex Parte the Minister For Finance & The Commissioner of Insurance as Licensing and Regulating Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 the Court of Appeal stated:

“Suffice it to say that a defect in form in the title or heading of an appeal, or a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court”.

42.This Court has time and again warned the litigants and their counsel that the failure by a party to properly intitule the proceedings may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs since it must be remembered that judicial review proceedings are special proceedings which are neither criminal nor civil. Proper intitulement of applications both for leave and the substantive Motion not only helps in minimizing confusion at the appellate level, but is a reflection of the fact that judicial review proceedings are in substance commenced so as to enable parties seek and obtain orders which are not ordinarily available in the usual civil proceedings.

Order

43.In the premises I hereby issue an order of mandamus compelling the Kajiado County and specifically the Chief Officer – Finance and Economic Planning, Mr. Morris Putita Kaaka, and the County Executive Committee Member, Keswe Mapena to satisfy the decree and certified costs issued by the High Court in Nairobi HCMisc.Appl. No. 442 of 2011 – Kilimanjaro Safari Club Limited vs. The Governor – Kajiado County & Others on 13th December 2011.

44.In light of my sentiments on the casual manner in which these proceedings were intituled, there will be no order as to costs.

45.Orders accordingly.

Dated at Nairobi this 30th day of May, 2016

G V ODUNGA

JUDGE

Delivered in the presence of: