REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

JUDICIAL REVIEW APPLICATION NO. 6 OF 2015

REPUBLIC OF KENYA……APPLICANT

VERSUS

MUNICIPAL COUNCIL OF NYERI……...……RESPONDENT

ex parte

RINGROAD RESIDENTS ASSOCIATION

JUDGMENT

The ex parte applicant filed a notice of motion dated 21st day of March 2013 seeking for orders that the motion be certified as urgent and heard on priority basis; that this honourable court be pleased to order for stay of implementation of the draft valuation roll, 2012 pending the hearing and the determination of the motion; that the court does issue an order of prohibition prohibiting the respondent from effecting new rates as enumerated in the draft valuation roll, 2012. The applicant also prayed for an order of certiorari to bring into this court and quash the decision of the respondent to give effect to the draft valuation roll, 2012. The motion was filed under **order 53 Rule 3 of the Civil Procedure Rules** and **sections 1A, 3 and 3A** of the **Civil Procedure Act**. It was supported by the affidavit of Daniel Wamahiu Kiongo sworn on 21st March, 2013 and filed in court on 22nd March, 2013.

In the affidavit verifying the statement of facts, Mr Kiongo swore that he is the chairperson of the applicant and had authority to swear the affidavit on its behalf and on behalf of its members. He also deposed that the applicant association was registered on 6th February, 2013 and is made up of property owners and ratepayers within the jurisdiction of the municipal council of Nyeri.

According to Mr Kiongo, the Association or its members were likely to be prejudiced by the council's draft valuation roll, 2012 which was set to be implemented in January, 2013. He complained that many ratepayers had not received the notice published by the municipal council since it was published in the People's Daily which, in his view, had limited circulation within the respondent's municipality. Other notices sent to individual ratepayers were not properly addressed to them. In any event, so Mr Kiongo swore, although the municipal council could only be entitled to new rates upon approval by the valuation court; according to him, this approval had not been obtained.

The respondent opposed the application and a replying affidavit in this regard was sworn on its behalf by Mr C.G.Gachanja. According to Mr Gachanja, the respondent appointed valuers to conduct the valuation after obtaining approval from the Minister of Local Government. The approval was duly gazetted in Kenya Gazette being notice number 12590; a copy of this notice was exhibited to the replying affidavit.

Contrary to the applicant's contentions, so Mr Gachanja swore, the draft valuation roll, 2012 was duly signed by the appointed valuer and considering that the previous valuation expired in the year 2011 the respondent was well within its statutory mandate to prepare a new valuation roll for the year 2012. On 12th April 2012, the draft valuation roll was tabled before and adopted by a meeting of the municipal council of Nyeri.

Upon the adoption of the valuation roll, the respondent notified the applicant's members together with other ratepayers in the municipality of the new rates through an advertisement in the People's Daily newspaper which, according to the respondent, has wide circulation within the respondent's municipality. Apart from this publication, the respondent also notified the ratepayers, including the applicant, of the new rates through a Gazette notice number 17654; this new rates were to take effect from January, 2012 and not January, 2013 as alleged by the applicant.

According to Mr Gachanja, the applicant together with the rest of the ratepayers in the respondent's municipality were given ample time to lodge their objections to the new rates but none of them ever objected. He swore that if the applicant's application is allowed, the respondent's operations which are largely funded by revenue from the rates would grind to a halt.

Besides the affidavit of Mr Gachanja, Wambui Kimathi who described herself as the County secretary of the respondent swore a supplementary affidavit in which she stated that the valuation roll was prepared and completed by an appointed government valuer on behalf of the respondent. She added that the respondent obtained the necessary approval before issuing instructions for preparation of the draft valuation roll. It is after receiving and tabling the draft valuation that the respondent proceeded to notify ratepayers and in particular the applicant's members of the new rates.

The learned counsel for the parties agreed to have the application disposed of by way of written submissions; I have had the opportunity to consider these submissions in this decision and my observation is that the learned counsel have largely dwelt on the compliance or non-compliance with the Rating Act, cap 267 and the Valuation for Rating Act, cap 266.

According to the applicant, the respondent was charged with and empowered by law to not only impose but also to levy rates on what it considered rateable property within its jurisdiction. The legal basis for this exercise was the repealed **Local Government Act cap 265, the Rating Act** and **the Valuation for Rating Act.**

It was the submission of the applicant's counsel that whereas the Rating Act is concerned with the imposition of rates, methods of valuation and connected purposes, it is the Valuation for Rating Act that prescribes the processes by which a local authority, such as the respondent, formulate a valuation roll or a supplementary valuation roll.

Under **section 3** of the **Valuation for Rating Act**, so counsel submitted, a local authority must at least once every five years cause valuation to be done on rateable property rateable property and values entered in a valuation roll but only after the local authority had obtained a ministerial approval.

As far as the present case is concerned, counsel for the applicant submitted that the previous valuation had been undertaken and had come into force in the year 2001. Accordingly, it was incumbent upon the respondent to obtain the approval of the Minister before initiating and bringing into effect the 2012 draft valuation roll. Since there was no such approval, there was manifestly a procedural impropriety which essentially affected the 2012 draft valuation roll.

Again, under **section 7** of the Rating Act, so it was submitted, that the local authority could only appoint a person or persons to value land for purposes of preparing a draft valuation roll with the approval of the Minister preceded by a resolution. Such a resolution, according to the applicant, has not been demonstrated to exist.

Counsel for the applicant also submitted that the applicant is aware of Gazette notice number 12587 dated

12th October 2010 approving the appointment of persons for purposes of preparing a draft valuation roll for the respondent; however, in the correspondence dated 3rd December, 2012 by one of the valuers, reference was made to the 2011 draft valuation roll which according to the applicant was not in issue.

Even assuming that there was a proper appointment and approval of the valuers, counsel for the applicant submitted that the next step of the rating authority should have been to elect and adopt a form of rating.

Counsel submitted that according to **section 6** of the **Valuation for Rating Act** the draft valuation roll should have included the particulars set out as to the description of the land, the name of the rateable owner, the value of the improved land, and the assessment of the improvement rate. If there was non-compliance then the local authority ought to have obtained from the Minister a declaration in writing that the valuer need not include the same in the draft valuation roll.

Upon completion of the draft valuation roll, **section 9(1)** of the Valuation for Rating Act required the valuer to sign the roll and insert the date of the completion and thereafter the roll should have been transmitted to the town clerk of the respondent local authority. According **to section 9 (2)** of the **Act**, the draft valuation roll should then have been laid before a meeting of the local authority; it was submitted on behalf of the applicant that no roll was ever placed before any meeting as prescribed by this provision of the law.

According to the applicant what is exhibited by the respondent in its replying affidavit as the draft valuation roll is in fact a "draft public land valuation roll"; it cannot be assumed to be the draft valuation roll, 2012.

As to the question of publication, it was submitted on behalf of the applicant, that members of the applicant were never notified of the valuation roll. In particular, counsel submitted that under subsection (4) the local authority was enjoined to send to every rateable owner a notice of the valuation within 21 days of the tabling of the draft valuation roll. Without proper publication of the notification, members of the applicant were denied the opportunity to challenge the findings of the valuation.

The learned counsel for the applicant also submitted that the provisions of the Rating Act and the Valuation for Rating Act must be interpreted in the context of the Constitution which demands the widest form of publication of information; without such publication, it was submitted, the respondent failed in its constitutional and statutory duties. Ultimately, the entire process was flawed and it was the counsel's submission that the council could not benefit from such a process.

In his submissions counsel relied on **Nairobi High Court Miscellaneous Application No. 187 of 2009 Republic versus Ruiru Municipal Council ex parte Alpha Knits Ltd & Another** and **Nakuru High Court Judicial Review Application No. 46 of 2011 Republic versus The Town Clerk, Town Council of Narok, ex parte Amir Suleiman** where similar issues arose and orders of certiorari were issued.

In response to the applicant's submissions, counsel for the respondent reiterated the depositions in the replying affidavit of Mr Gachanja and the supplementary affidavit of Ms Wambui and submitted that the pre-existing valuation roll was set to expire on 31st December, 2011; accordingly, the respondent was bound by statute to prepare a new valuation roll for the year, 2012.

Counsel submitted that the respondent's town clerk tabled the draft valuation roll before the full local council meeting where it was adopted vide minute number **FS GP 26/2012**. He added that the valuation roll became valid once it was signed and laid before the full council; accordingly so counsel submitted, **section 9** and **section 9(2)** of the Valuation for Rating Act were duly complied with.

As far as the publication of the new rates is concerned, the learned counsel submitted that the valuation roll was gazetted in **Gazette notice number 17654** of 21st November, 2012 and under **section 18 (1)** of the Valuation for Rating Act the roll became effective and succeeded to the previous one. Besides the publication through a Gazette notice, the respondent caused to be published a notice of the new rates in

the newspaper that had wide circulation within the Nyeri municipality on 23rd November, 2011. The applicant and other ratepayers were therefore duly notified of the new rates and those among them who were not satisfied, including some members of the applicant association filed their objections. Some of the objections had even been determined by the valuation court; it was the counsel's position that if they were not satisfied with the decisions of the valuation court they should have appealed against it under **section 19** or filed a reference under **section 20** of the Valuation for Rating Act.

Counsel argued that having subjected themselves to the procedure provided for under the Valuation for Rating Act in determinations of objections to valuation roll it was late in the day for the applicant to purport to challenge the respondent's decision by way of an application for judicial review orders. In any event, so counsel argued, six months had elapsed since the decision was made and therefore the order for certiorari cannot issue.

On the question whether the approval of the Minister was obtained before the valuers were appointed, counsel submitted that indeed that approval was obtained in accordance with **section 7** of the Rating Act and in this regard he made reference to Gazette notice number 12587 of 12th October, 2010 in which the approval was gazetted.

Apart from the approval for appointment of the valuers, the respondent also sought and obtained the Minister's approval as to the form of rating to be applied in effecting the draft valuation roll contrary to the applicant's allegations that it was not.

As to whether the valuers signed the draft valuation, the respondent submitted that the valuation roll was duly prepared, completed and signed by the valuer and therefore the allegation that the roll was not signed had no factual basis.

As far as the question of the respondent's statutory mandate of causing to be prepared a new valuation roll beyond 10 years is concerned, counsel submitted that according to **section 3** of the **Valuation for Rating Act**, the respondent was authorised to cause a valuation to be made of every rateable property within its jurisdiction in respect of which a rate on the value of land was or was to be imposed; subsequently, the values were to be entered in the valuation roll from time to time.

It was also counsel's submission that the respondent did not exceed its mandate by declaring the effective date of the draft valuation roll when it was subject to objections in the valuation court. In this regard counsel made reference to **section 18(1)** of the Valuation for Rating Act which provides that after the draft valuation roll is laid before the meeting of the local authority, the same is deemed to be the valuation roll with effect from the commencement of the financial year for which it was prepared; it thus formed the basis of imposition of rates. If by any chance the objections lodged by the objectors were determined in their favour after the valuation roll had become operational they were entitled to a refund of the excess rates paid. Accordingly, counsel argued, the argument that the respondent had no legal right to demand rates on the basis of the draft valuation roll 2012 has no basis in law.

In a nutshell, counsel urged that the respondent complied with all the statutory requirements pertaining to formulation and operationalisation the draft valuation roll 2012.

Be that as it may, counsel argued that the action by the applicant is not sustainable in law for the simple reason that the municipal council of Nyeri was no longer in existence following the repeal of the **Local Government Act, Cap 265** under which it was created. The repeal was effected vide the **County Government Act, Act No. 17 of 2012** according to which the County Governments took over the functions of the then local authorities.

In support of his submissions counsel relied on **Nakuru High Court Judicial Review No. 49 of 31 of 2009, Republic versus Municipal Council of Nakuru, ex parte Tom Wambua Reuben & 96 Others,** and **High Court Miscellaneous Application No. 18 of 2013, Hon. Babeere M'Mbijiwe versus Tana River Services Board & 2 Others.**

Considering the nature of some of the prayers which the applicant sought and, in view of the fact that the municipal council of Nyeri under whose aegis the draft valuation roll, was enforced was no longer in existence, I summoned the parties in this matter to appear before me again on 13th June, 2016 to confirm whether the valuation roll was still in force under the current government set-up. They all confirmed that indeed the roll was in force as at that date. This being the case the primary question, in my view, is whether in enforcing the draft valuation roll 2012 the then respondent council complied with the provisions of the Valuation for Rating Act and the Rating Act. If the answer to this question is in the negative, the next question that would logically follow is whether it is in order for the County government of Nyeri continue to enforce the valuation roll and therefore whether it ought to have been joined to this suit as a respondent.

Section 216 (1) of the **Local Government Act, cap 265** (repealed) provided for a fund known as the general rate fund for every local authority; it is in this fund that the particular local authority's rates, amongst its other specified revenue, was deposited.

According to **section 3** of the **Rating Act, cap 267** it was the duty of the local authority as the Rating Authority to levy rates to meet all liabilities that were discharged out of the general rate fund. Amongst the rates levied was a rate known as an area rate which is a rate that was generally levied on land, described as rateable property by the **Valuation for Rating Act cap 266**, depending either on its size, the purpose for which it had been put into or the improvements thereon. **(See section 5(1) thereof)**. There is no dispute therefore, that the municipal Council of Nyeri could levy rates for purposes envisaged under the repealed Local Government Act and the Rating Act; the only question, as noted, is whether the council complied with the relevant statutory provisions in laying out the framework for levying of the rates for the year 2012 and beyond and whether this framework, which I understand to be the draft valuation roll 2012, was valid at all.

The thrust of the applicant's argument is that the respondent flouted these provisions; the respondent on the other hand insists that it complied with all the statutory prescriptions for the formulation and enforcement of the valuation roll in issue.

The appropriate place to locate the answer to these rival arguments is the law that prescribes when and how a local authority such as the respondent could formulate and enforce a valuation roll as a means of levying of rates on rateable property.

We have already seen that the legal foundation for collection of various forms of rates, including land rates, by local authorities was the repealed Local Government Act and the Rates Act and the duty to collect these rates lay on the local authorities themselves. The legislation that governed, and which I believe still governs the valuation of rateable property for purposes of determination of rates payable, is the Valuation for **Rating Act cap 266**. Under **section 3** thereof, every local authority was enjoined from time to time, but at least once in every 10 years or such a longer period as the Minister for Local Government would approve, cause a valuation to be made of every rateable property within the area of the then local authority in respect of which a rate on the value of the land was to be imposed; the valuations were then entered in valuation roll.

A local authority could also prepare a supplementary valuation roll to include a rateable property if it had, for one reason or another, been omitted from the valuation roll; or there was a new rateable property that was required to be included in this roll; or, an existing rateable property had been subdivided or consolidated with other rateable property; or, any rateable property which, from any cause particular to such a property arising since the time of valuation had materially increased or decreased in value. The local authority could, in such circumstances, either on its own initiative or at the request of any person amend the valuation and cause a supplementary valuation roll to be prepared, from time to time (See **section 4(1)** of the **Valuation for Rating Act**).

The character of and the procedure for preparation of a valuation roll contemplated under **section 3** of the valuation for Rating Act, which is the roll in contention in this case are prescribed in various provisions of that Act. According to **section 5** of that act, a valuer has power to enter into or upon any land within the

area of the local authority in respect of which a rate on the value of the land is to be imposed and inspect it for purposes of preparing a draft valuation roll or draft supplementary valuation roll. He may also require the rateable owner provide certain information as may be necessary to enable the value to prepare a draft valuation roll or a draft supplementary valuation roll accurately.

Section 6 prescribes the contents of a draft valuation roll or a draft supplementary valuation roll; either of these rolls must include such information as the description, situation and area of the land valued; the name and address of the rateable owner; the value of the land; and, the assessment for improvement rate. **Section 7** defines who the rateable owner is and **section 8** provides the basis for calculation of the value of the land for purposes of a valuation roll or a supplementary valuation roll. **Section 9** makes provision for deposit of draft valuation and supplementary valuation rolls. This particular provision attracted considerable attention from both counsel and was central in their submissions on whether or not the respondent complied with the provisions relating to the draft valuation roll in issue; considering this provision's centrality to the question at hand, it is necessary that it is produced here verbatim:

> ***9. Deposit of draft valuation and supplementary valuation rolls***
>
> ***(1) When a draft valuation roll or draft supplementary valuation roll has been completed, the valuer shall sign the roll and insert therein the date of completion thereof, and shall transmit the roll to the town clerk.***
>
> ***(2) As soon as may be after a draft valuation roll or draft supplementary valuation roll has been transmitted to him by the valuer, the town clerk shall lay the roll before a meeting of the local authority, and the roll shall thereafter be available at the office of the local authority for public inspection, and any person may, during ordinary business hours, inspect it and take copies or extracts from it.***
>
> ***(3) The town clerk shall publish notice in respect of every draft valuation roll and draft supplementary valuation roll that it has been so laid and may be inspected, and such notice shall state the manner in which and the latest date by which objections to the same may be made.***
>
> ***(4) Every local authority shall, within twenty-one days after the laying before a meeting of the local authority of a draft valuation roll or draft supplementary valuation roll send to every rateable owner of a rateable property comprised in the roll a notice of the valuation thereof inserted in the roll, whether or not the new valuation makes any change.***

This provision is, by and large, self-explanatory; it is clear that the draft valuation roll must be complete and this completion is signified by the valuer's signature and the date of completion. It is in that form that it could then be transmitted to the town clerk.

Upon receiving the complete valuation roll, it was up to the town clerk of the local authority to lay the roll before a meeting of the local authority and thereafter the roll was made available for public inspection at the local authority's office.

It was incumbent upon the town clerk to publish a notice to the effect that the roll has been made available for public inspection. The notice would invite objections to the draft roll and would also state the manner such objections could be lodged and the deadline for lodging them.

Apart from publishing the roll and inviting objections thereto it was also the obligation of the local authority to send a notice to every owner of a rateable property included in the roll alerting them of the valuation of their property in the draft valuation roll; it did not matter that the existing valuations had been retained in the draft valuation roll: the notices appear to have been necessary irrespective of whether there were any changes or alterations in the valuation of rateable property.

Going back to the material submitted before court, there is no doubt that the then municipal council of Nyeri prepared a draft valuation roll contemplated under **section 3** of the **Valuation for Rating Act**.

Amongst this material is the affidavit sworn by Daniel Wamahiu Kiongo verifying the applicant's statement of facts and on which he exhibited a copy of a notice in the People Daily newspaper of 23rd November 2012 notifying all and sundry that the draft valuation roll of the municipality of Nyeri for the year 2012 had been laid before a meeting of the municipal council of Nyeri on 12th April 2012 and was now available for public inspection at the council's offices.

There is also a copy of the extract of the valuation roll exhibited on the respondent's replying affidavit signed by one **Sarah Wanyande**, a registered valuer; in this extract the valuer certified that she had prepared and completed the roll on 16th February 2012. There is therefore sufficient evidence that there was a valuation roll which was complete in all its respects and in particular, it was signed by the valuer who endorsed in it the date of completion. There is no suggestion, either in the affidavit verifying the facts or in the affidavit supporting the substantive motion that the roll was neither signed nor dated; neither is there any suggestion that the roll was not complete. Certainly there couldn't be such suggestion in the face of the evidence of the existence of a valuation roll that was duly completed, signed and dated.

As to whether the draft valuation roll was laid before a meeting of the respondent council, Mr C.G. Gachanja swore that indeed it was so laid and adopted on 12th April, 2012; as a proof of this fact, he exhibited on his affidavit a copy of the extract of the minute showing that the draft valuation roll was laid before the finance, staff, and general purposes meeting held on 12th April, 2012 for adoption and indeed it was adopted as minute number **FSGP 26/2012**. Again, this piece of evidence was not discounted; at very least, the applicant did not file any affidavit further to the affidavit sworn in support of the substantive notice of motion disputing this fact. In the absence of any evidence to the contrary, it is apparent that the valuation roll was laid before a meeting of the respondent council and, going by the public notice appearing in the People Daily newspaper of 12th November, 2012, the roll was made available for public inspection at the respondent's office.

It was clear in the notice published in the press that the roll had been made available for public inspection. It is also apparent from that notice that the public or any section thereof was invited to lodge objections to the draft roll; the time for lodging such objections was specified as 28 days from the date of the notice.

Apart from the publication in the press, the same notice was placed in the Kenya Gazette identified as **Gazette Notice No. 17654;** a copy of this notice was also exhibited in the affidavit of Mr. C.G. Gachanja.

Up to that point, I am convinced that the respondent had complied with the provisions of **section 9 (1), (2) and (3)** of the Valuation for Rating Act. **Section 9** does not, however, end there; it also has subsection (4) which, as noted, required the local authority to send a notice to every owner of a rateable property notifying them of the valuation of their property in the draft valuation roll. The subsection is couched in mandatory terms and so the respondent had no choice but to send out these notices to owners of rateable property within its area despite the fact that the notice had been published in a daily newspaper and in the government Gazette.

The answer by the respondent on whether it complied with this particular provision was not quite convincing; according to Mr C.G. Gachanja, the only evidence that the notices were sent to the intended addressees is what he referred to in his affidavit as "*numerous objections received by the respondent*". Further, it was argued on behalf of the respondent that some of the members of the applicant had lodged these objections and in fact some of them had been determined by the valuation court.

With due respect to the learned counsel for the respondent evidence of service could only be proved by proof that the notices had been served by any of the means prescribed under **section 30 (2)** of the Valuation for Rating Act; that provision states as follows:

> ***30. Publication and service of notices, etc.***
>
> ***(1) Except where otherwise provided by this Act, any notice required to be published under this Act by a local authority shall be published by advertisement once in the Gazette and in one or***

more newspapers circulating in the area of jurisdiction of the local authority.

(2) Any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act may be sent or served either—

(a) by delivering it to the person to or on whom it is to be sent or served; or

(b) by leaving it at the usual or last known place of abode or business of that person, or, in the case of a company, at its registered office; or

(c) by ordinary or registered post; or

(d) by delivering it to some person on the premises to which it relates, or, if there is no person on the premises to whom it can be delivered, then by fixing it on or to some conspicuous part of the rateable property; or

(e) by any method which may be prescribed:

Provided that, if a local authority, having attempted to send or serve a notice, demand or other document by one of the methods provided in paragraphs (a), (b), (c), (d) and (e), has reason to believe that the notice has not been received by the person to whom it was addressed, it may advertise, in the manner provided in subsection (1), the general purport of the notice, demand or other document, and thereupon such notice, demand or other document shall be deemed to have been received by such person, and any such advertisement may refer to one or more notices, demands or other documents and to one or more rateable owners.

(3) Any notice, demand or other document by this Act required or authorized to be served on the owner or occupier of any premises may be addressed by the description "owner" or "occupier" of the premises (naming them), without further name or description.

(4) When any notice, demand or other document required or authorized to be sent or served under or for the purposes of this Act has been sent by ordinary or registered post, delivery or service thereof shall, unless the contrary is proved, be deemed to have been effected at the time at which a letter would be delivered in the ordinary course of the post.

It was incumbent upon the respondent to prove that the objectors had been served through any of the means prescribed, more particularly under **section 30 (2)** of the Act. There is no evidence of the so-called numerous objections and neither was there any proof of any decision by the valuation court on such objections. In the absence of proof of service as prescribed by the Act, the only conclusion that one can make is that the respondent did not send a notice of the valuation of the rateable property to every rateable owner as prescribed under **section 9(4)**; in other words, it flouted this provision of the law.

Having so held, it would have been worthwhile to end this matter here and grant the application for the simple reason that failure to observe a mandatory statutory requirement renders the ensuing act illegal or invalid; in **Jacqueline Resley versus The City Council of Nairobi (2006) 2 EA 311**, this Court Visram and Ibrahim JJ (as they then were) addressed this issue of the necessity to comply with the statutory provisions by public authorities such as the respondent; the court said as follows:

> "***In this case there is an apparent disregard of statutory provisions by the respondent, which are of a fundamental nature. The Parliament has conferred powers on public authorities in Kenya and has clearly laid a framework on how those powers are to be exercised and where that framework is clear, there is an obligation on the public authority to strictly comply with it to render its decision valid…"***

The matter does not, however, end here; counsel for the respondent raised the issue whether the municipal council of Nyeri was capable of being sued at the time it was sued. Counsel's argument was based on the

fact that the municipal council of Nyeri was no longer in existence and had been supplanted by the County Government of Nyeri which was not party to these proceedings.

No doubt this was a valid question which ought to have been interrogated and determined as a preliminary issue; however, I thought it would be appropriate to assess the merits of the applicant's application assuming that the respondent was the proper party and the application against it was properly before court.

The municipal council of Nyeri was established under **section 12 (1)** of the Local Government Act; this Act was repealed by dint of **County Governments Act, No. 17 of 2012** whose section **134** provides:

134. Repeal of Cap. 265

> **(*1) The Local Government Act is repealed upon the final announcement of all the results of the first elections held under the Constitution.***
>
> ***(2) All issues that may arise as a consequence of the repeal under subsection (1) shall be dealt with and discharged by the body responsible for matters relating to transition***.

The first elections held under the Constitution referred to in **subsection (1)** were held on 4th March 2013. The record shows that the chamber summons seeking leave of the court to apply for the orders of judicial review against the respondent was filed on 28th February, 2013 but it was not until 5th March, 2013 that the leave sought was granted.

The substantive motion for the judicial review orders was subsequently filed on 22nd March, 2013 by which time, I take judicial notice, that all the results of the first elections held under the current Constitution had been announced. That being the case, the municipal Council of Nyeri was defunct and was no longer in existence at the time this motion was instituted against it. The leave granted on 5th March, 2013, assuming that all the results had not been announced on that date, had been overtaken by events, more particularly by the operation of law.

It followed that if the municipal council of Nyeri was defunct, no legal proceedings could be taken against it since it had ceased being a body corporate with perpetual succession and a common seal and was no longer capable in law of suing and being sued as a corporate body under **section 12 (1)** of the repealed Local Government Act. In the same vein, much as I have found that there is some force in the applicant's arguments on whether the respondent complied with the provisions of the Valuation for Rating Act in the formulation of the valuation roll, these arguments would only have been of value to the applicant if the cause of action against the respondent survived it and could possibly be instituted or maintained against its successor. I take this view advisedly because I am minded that although the County Governments took over the functions that were hitherto performed by local authorities, there is no suggestion in the County Governments Act that County Governments succeeded, in the strict sense of the word, the local authorities.

The succession process to the devolved Governments was managed by the **Transition to Devolved Government Act, Cap 265A**; amongst the objects and purposes for which this Act was enacted was to provide a legal and institutional framework for a co-ordinated transition to the devolved system of government while ensuring continued delivery of services to citizens and in particular to share responsibilities, functions, assets and liabilities between the national Government and the County Governments. (See **section 3** of the Act). **Section 4** of the Act established the oversight body known as the Transition Authority to manage these transitional logistics; for instance, according to **section 7(2) (h)** of the **Act**, this body was tasked to develop the criteria to determine the sharing out and the transfer of assets and liabilities from the local authorities to either the national government or the County Governments.

There is no doubt therefore that the Transition Authority is the body to which **section 134(2)** of the

County Governments Act makes reference and it is the body that ought to have spelt out clearly the responsible institution for any liabilities attributed to the defunct local authorities as some of the issues that arose as a consequence of the repeal of the **Local Government Act**.

If, on the other hand, it is the applicant's view that the current Government set-up is perpetuating an illegality that was triggered by the defunct respondent, then obviously the suit cannot be sustained in its present form.

For the reasons that have stated I agree with the learned counsel for the respondent that the applicant's motion is defective and fatally so; it is hereby struck out with no order as to costs.

Signed, dated and delivered in open court this 28th October, 2016.

Ngaah Jairus

JUDGE