



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 131 OF 2013

REPUBLIC.....APPLICANT

VERSUS

THE ATTORNEY GENERAL..... RESPONDENT

KIRINYAGA CONSTRUCTION CO. LTD – EX-PARTE APPLICANT

RULING

1. The ex parte applicant instituted these proceedings seeking orders of mandamus compelling the Principal Secretaries in the Ministry of Finance and/or Ministry of Roads and Public Works to jointly and severally pay to it the sum of Kshs 321,986,586.94 with interests and in default the occupant of those positions be committed to jail in contempt of the aforesaid orders. The said sum was expressed to have been awarded in HCCC No. 885 of 2009 – **Kirinyaga Construction (K) Ltd vs. Attorney General.**
2. When the said application was due for hearing the respondent on 23rd August, 2013 filed a Notice of Motion dated 22nd August 2013 expressed to be brought under the provisions of Order 1 Rule 15 of *the Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and the inherent jurisdiction seeking the following orders:
 1. **THAT the Kenya Revenue Authority be enjoined to these execution proceedings.**
 2. **THAT M/S Kirinyaga Construction (K) Limited do serve the Kenya Revenue Authority with all documents relating to the application for execution herein.**
 3. **THAT the Kenya Revenue Authority do file Affidavit evidence showing with elaborate breakdowns and explanations how the Kshs.202,281,663.66/= was used to defray the Ex parte applicant's Tax liabilities.**
 4. **THAT the costs of t his application be in the cause.**
3. Having considered the nature of the orders sought herein I directed that this application be heard before the main application. This ruling is therefore the subject of the application dated 22nd August 2013.

APPLICANT'S CASE

4. The said application was by an affidavit sworn by **Eng. John Kipng'etich Mosonik**, the Principal Secretary, Ministry of Roads and Infrastructure (hereinafter referred to as the Ministry) on 22nd August, 2013.
5. According to the said affidavit, from the records held by the Ministry, part of the said amount and specifically, Kshs 202,281,663.66 had been deducted by the Ministry from the sums due to the ex

- parte applicant and remitted to Kenya Revenue Authority (hereinafter referred to as KRA) in compliance with the provisions of the **Finance Act** No. 4 of 2004 and the Value Added Tax (Tax Withholding) Regulations 2004 (Legal Notice No. 53) of 10th June 2004 on behalf of the ex parte applicant.
6. It was further deposed that the Respondent herein was ordered by the Court to refund to the *ex parte* applicant Output VAT and Withholding Corporation Tax amounting to Kshs 202,281,663.66. However, it is averred that the KRA wrote to the Permanent Secretary Ministry of Finance and copied the letter to the Solicitor General on 4th day of April 2011 indicating that the amount remitted to it was to defray tax liabilities owed by the ex parte applicant.
 7. According to the deponent, KRA being the recipient of the said sum will have pertinent information that will help in the determination of this matter. In his view, if the Respondent is compelled to pay the said sum of Kshs. 202,281,663.66, without joinder of KRA, it amount to double compensation in that the Ministry would have paid the Tax liabilities of the ex parte applicant and also paid the same amount to the ex parte applicant directly which would amount to unjust enrichment and contrary to public policy. In the premises, it is the deponent's view that the participation of KRA is crucial as it will assist the Court in arriving at a just determination of the matter at hand. In his view, the joinder of KRA will not be prejudicial to the *ex parte* applicant and since the suit concerns a matter of great public interest involving hefty sums of public funds, it is in the interest of justice that the orders sought be granted.
 8. In support of the application, **Mr. Njoroge**, learned counsel for the Respondent submitted that since this is a Court of justice it is enjoined under Article 159 of the Constitution to observe substantive justice in any matter so as to promote the principles of constitutionalism under Article 201 of the Constitution which deal with the principles of Public Finance and accountability so that public finance is utilised in a prudent way. He further relied on Article 228(5) of the Constitution and submitted that the Controller of Budget who is only one of the persons involved in the approval of payment is barred from approving withdrawal of funds unless approved by law. According to him by remitting the said sum to KRA, the Ministry was performing his duty under the law and cannot be said to have failed by not so doing. Since KRA used the said sum in settling the tax obligations of the ex parte applicant herein the said sum is no longer available and the only evidence as to how the said sum was applied by KRA is with KRA. In the event that the orders sought by the applicant were made, it was submitted, the Ministry would be compelled to pay the same without recourse on the part of the Ministry to recover the same from KRA. As long as the Ministry was fulfilling its statutory obligation, before the Court considers the orders sought by the ex parte applicant, the court ought to have full evidence of receipt of the money and that it was utilised for genuine liabilities of the ex parte applicant and once that is done the Court can consider both the evidence of the parties before the orders sought and granted. According to **Mr. Njoroge**, it behoves the Court to hear every fact pertinent to the case since if the Minister was compelled to pay, he would not meet the Constitutional provisions cited and would meet audit queries yet the person in the way will not be a party to this case. In his view if the Court were to find that the applicant was liable to pay KRA the orders granted would have been fatal.
 9. In support of his submissions, **Mr. Njoroge** relied on **Econet Wireless Kenya Limited vs. The Minister for Information & Communication of Kenya & Another [2005] eKLR** on the need for the Court to hear each fact before orders dealing with the liberty are made. He also relied on **Ramesh Kumar Gupta vs. Commissioner of Lands & Another Nairobi HCMISC. Appl. No. 598 of 1999** on the inability of the enforcement of the orders sought if granted. He also referred to the case of **Dhanji Jadra Ramji vs. Commissioner of Prisons & Another Nakuru HCCC No. 275 of 1998** to the effect that the Court should not order a party to lose his liberty where the party is not in a position to do what he is required to do.
 10. **Mr Njoroge** therefore urged the Court to favourably consider the application.

RESPONDENT'S CASE

11. In opposition to the application, the ex parte applicant filed the following grounds of opposition:
 1. **The ex-parte applicant and the Respondent entered into a consent on 8th November, 2010, whereby the respondent agreed to pay the ex parte applicant a total sum of**

- Kshs.321,986,586.94, in HCCC No.885 of 2009 Kirinyaga construction (K) Limited v AG, which consent is now an order of court.
2. **The Kenya Revenue Authority was not a party to those proceedings, and therefore any amount which may or may not be due is irrelevant to these proceedings.**
 3. **The only issue in this matter is when and not whether payment should be made. Accordingly, the joinder of Kenya Revenue Authority ought not to be allowed as it is not a necessary party for the determination of that issue.**
 4. **The deduction of the sum of Kshs.202,281,663/- to defray the alleged ex-parte applicant's tax liabilities is admitted as having been wrongful as no such sum were payable and the annexure to the affidavit of Eng. Kipng'etich Mosonik is not evidence of any such event.**
 5. **In any event the claim alleged in the application herein could only be as between the Respondent and the Kenya Revenue Authority, to be resolved *inter se*, and cannot be imported into an application for execution of a court decree.**
 6. **The application herein is a fishing expedition and is a further attempt to delay the payment of the sum of Kshs.321,986,586.94.**
 7. **The Respondent has and continues to act in bad faith as the decretal sum of Kshs.321,986,586.94 and interest thereon has not been paid to the ex-parte applicant, either in part or in full even though the Respondent does not dispute that it is due and owing to the ex-parte applicant.**
 8. **The Respondent's conduct of this entire matter has been extremely indolent to the prejudice of ex-parte applicant's business and future existence, and ought not to be allowed to persist in such peer laxity.**
 9. **Public interest demands that the Respondent and/or the Ministry of Roads and Public Works pay its debts and be subject to the law of the land.**
12. In support of the said grounds of opposition, **Mr. Ojiambo**, SC, learned counsel for the ex parte applicant submitted that whereas the application is predicated on the inherent jurisdiction of the Court and Article 159 of the Constitution which requires the Court to do substantive justice without undue regard to procedural technicalities, the Court's attention has not been drawn to any such procedural technicalities. In his view, the application for *mandamus* has no procedural technicalities but seeks to enforce a valid judgement which has not been challenged. In **Mr. Ojiambo's** view the Respondent has not stated that the judgement was obtained fraudulently and has not disclosed that it was by consent. In his view, if we are to speak of substantive justice, it must relate to that judgement. With respect to public interest, he submitted that equating it to the amount demanded is not what public interest is all about since it is not about money due. The Constitution, he submitted, holds sacrosanct the right to property of an individual which has been properly ruled by the Court to be due to the ex parte applicant. Article 40, he stated protects that property even against the State. With respect to Article 201 on Public Finance, he contended that the same is totally irrelevant since here we are talking about a legitimate debt admitted as due to a citizen.
13. Dealing with the cases cited, he was of the view that the same deal with cases of contempt and so far the said matter is not before the Court since what is sought is an order of *mandamus* and contempt is only sought in the event of failure to pay. To him the application is hopelessly incompetent since what was before the Court were execution proceedings. The application in so far as it is brought under Order 1 rule 15 of the **Civil Procedure Rules** which deals with third party notice in his view is inapplicable since the same applies to contribution by KRA. However the grounds and the affidavit do not show how this is so. To him, if KRA is to contribute, the respondent has a claim against KRA but not under Order 1 rule 15. In any case the said provision deals with situations where pleadings have not been closed. The present case, it was submitted, is completely different as the issues have been determined between the Respondent and the *ex parte* applicant hence the issue has nothing to do with the *ex parte* applicant's liability in tax. The underlying suit was about monies due for work done and certain breaches which culminated into a consent judgement being entered into. The issue having been determined there is no other issue between the applicant, the Ministry and KRA since if there was such an issue it ought to have been raised in the previous proceedings. Referring to an attachment to the replying affidavit, he submitted that it has nothing to do with the underlying suit which had to do with construction

- contract. The said letter, in his view, makes no reference whatsoever to the present suit or any claim made in this suit but deals with the general question of refunds of tax due to the applicant and not due from the applicant which is clearly unrelated to the present case.
14. According to Senior Counsel, if there was an issue KRA would have been the first to come to court. In his view there is no issue to be tried between the applicant, the Respondent and KRA and hence there is no basis for a complete interloper should be allowed to join to frustrate an already crystallised right by the court to be paid amounts due to them. The Government, he submitted, like any other person has a duty to pay its debts which duty doubles if the obligation arises from the order of the Court made by consent. According to him, it is an abuse of Court process to seek to frustrate the applicant. To him, it is not the obligation of the respondent to pay taxes for anybody else which is an obligation due to KRA. The only obligation to pay taxes for anybody is when KRA issues an order attaching a property which evidence is non-existent in this case. He urged the Court to dismiss the application in order to uphold a just demand showing that that the State cannot shirk from its responsibility to a judgement creditor. In his view there would be no prejudice caused to KRA since if it is proved that there is any tax due there are statutory remedies available hence there is no basis to uphold the application.
15. According to **Mr. Ojiambo**, to allow the application would have the effect of setting aside the judgement. In support of the ex parte applicant's position he referred to **Kenindia Assurance Limited vs. Muturi [1900-1994] EA 184**, **Departed Asian Property Custodian vs. Jaffer Brothers [1999] 1 EA 55**, **Peter & Co. Limited vs. Mangalji [1969] EA 80** and **Amon vs. Raphael Tuck & Sons [1956] 1 ALL ER 273**, and submitted that you cannot join a party unless the Court is satisfied it will be able to deal fully with the issue raised. Apart from that, there has to be a link between the applicant and KRA in these proceedings and if the connection is not there you cannot join the said party. In his view, the application was maliciously brought, almost cynically with the intention of delaying payment to the applicant in a judgement obtained a long time ago and ought to be dismissed.

REJOINDER BY THE RESPONDENT

16. In a rejoinder, **Mr Njoroge** submitted that where money is payable to KRA under the law, the same is irrecoverable from KRA no matter what the Ministry does hence it is incumbent to ask the Court to take extraordinary steps to ensure justice is done. In his view, if there was an avenue of recovering the money from KRA without queries, the Respondent would have no problem but as things stand it behoves the Ministry to come to Court for extraordinary measures.

DETERMINATIONS

17. As indicated at the beginning of this ruling, the instant application is expressed to be brought under the provisions of Order 1 Rule 15 of the Civil Procedure Rules, Section 3A of the **Civil Procedure Act** and the inherent jurisdiction.
18. Under Article 165(2)(a) as read with Articles 162(2) and 165(5) of the Constitution the High Court has unlimited jurisdiction in Criminal and Civil matters save for matters reserved for the exclusive jurisdiction of the Supreme Court and matters relating to employment and labour relations and the environment and the use and occupation of, and title to, land. It is now well settled that judicial review applications are neither criminal nor civil in nature. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1**. It follows that in determining judicial review applications the High Court is exercising "any other jurisdiction, original or appellate, conferred on it by legislation" under Article 165(3)(f) of the Constitution. In this case the relevant legislation is the **Law Reform Act**, Cap 26 Laws of Kenya as read with Order 53 of the **Civil Procedure Rules**. The **Law Reform Act** in Section 8 while recognizing the fact that the High Court has no jurisdiction either in its criminal or civil jurisdiction to issue prerogative orders of *mandamus*, prohibition or *certiorari*, provides that in any case in which the High Court in England is, by virtue of the provisions of section 7 of the **Administration of Justice (Miscellaneous Provisions) Act**, 1938, of the United Kingdom empowered to make an order of *mandamus*, prohibition or *certiorari*, the High Court shall have power to make a like order.
19. It was however trite law as reiterated in **Jotham Mulati Welamondi vs. The Electoral**

- Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4** that “judicial review being a special procedure as the Court is exercising neither a civil nor criminal jurisdiction in the strict sense of the word the invocation of the provisions of section 3A and.....the Civil Procedure Rules...render the application wholly incompetent and fatally defective. Accordingly the provisions of the *Civil Procedure Act* and Rules thereunder are inapplicable to judicial review application.”
20. It follows that the provisions of the *Civil Procedure Act* and the Rules cited by the Respondent herein are inapplicable to application for judicial review.
21. It is however, recognised that the court has inherent powers to make such orders as may be necessary for the ends of justice. Inherent power, it must be stressed is not donated by Section 3A of the *Civil Procedure Act*. In **Ryan Investments Ltd & Another vs. The United States of America [1970] EA 675** it was held that section 3A of the *Civil Procedure Act* is not a provision that confers jurisdiction on the court but simply reserves the jurisdiction which inheres in every court. The court has inherent jurisdiction not created by legal provisions, but which only manifests the existence of such powers.
22. Dealing the same powers it was held in **Republic vs. The Public Procurement Complaints, Review and Appeals Board & Another Ex Parte Jacorossi Impresse Spa Mombasa HCMA No. 365 of 2006** that the Court has power under its inherent jurisdiction to make orders that may be necessary for the ends of justice and to enable the Court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.
23. Similarly, in **The Matter of The Estate of George M’mboroki Meru HCSC No. 357 of 2004, Ouko, J** (as he then was) expressed himself inter alia as follows:
- “The Law of Succession Act, like section 3A of the Civil Procedure Act has a saving provision as to the court’s jurisdiction under section 47 which is affirmed by rule 73 of the Probate and Administration Rules. It is therefore accepted that the court retains certain intrinsic authority in the absence of specific or alternative remedy, a residual source of power, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent abuse of its process, to do justice between the parties and to secure a fair trial between them.”**
24. **Kimaru, J** also had an occasion to deal with the same issue in **Rev. Madara Evans Okanga Dondo vs. Housing Finance Company of Kenya Nakuru Hccc No. 262 of 2005** where he expressed himself as follows:
- “The court will always invoke its inherent jurisdiction to prevent the abuse of the due process of the court. The jurisdiction of the court, which is comprised within the term “inherent”, is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of the substantive law; it is exercisable by summary process, without plenary trial, it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of the court. The inherent jurisdiction of the court enables the court to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process. In sum, it may be said that the inherent jurisdiction of the court is virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”**
25. However in **Meshallum Wanguhu vs. Kamau Kania Civil Appeal No. 101 of 1984 1 KAR 780 [1987] KLR 51; [1986-1989] EA 593, Hancox, JA** (as he then was) emphasised that it is a

- residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice.
26. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.
27. It follows that whereas the provisions of the Act and the Rules cited by the Respondent are irrelevant in so far as judicial review proceedings are concerned, the Court has inherent powers to make such orders and give directions for the ends of justice and to enable the Court maintain its character as a court of justice.
28. In this case, the Respondent seeks to have KRA joined to these proceedings on the ground that part of the decretal sum for which the order of mandamus is sought by the ex parte applicant was remitted to KRA in satisfaction of a statutory duty imposed upon the Respondent. It is therefore contended that to compel the respondent to pay the said sum remitted to KRA will amount to double payment to the ex parte applicant and in effect unjustly enrich the ex parte applicant while at the same time adversely affecting the respondent who will be forced to make the said payment from public funds an act which is unlikely to be authorised. Article 201 of the Constitution which the Respondent relies upon provides as hereunder:

The following principles shall guide all aspects of public finance in the Republic—

- (a) there shall be openness and accountability, including public participation in financial matters;***
- (b) the public finance system shall promote an equitable society, and in particular—***
- (i) the burden of taxation shall be shared fairly;***
- (ii) revenue raised nationally shall be shared equitably among national and county governments; and***
- (iii) expenditure shall promote the equitable development of the country, including by making special provision for marginalised groups and areas;***
- (c) the burdens and benefits of the use of resources and public borrowing shall be shared equitably between present and future generations;***
- (d) public money shall be used in a prudent and responsible way; and***
- (e) financial management shall be responsible, and fiscal reporting shall be clear.***

29. It is clear that the said provision requires openness and accountability in financial matters and that public money be used in a prudent and responsible way. The need to ensure that public funds are spent responsibly is entrenched by the fact that execution as in ordinary proceedings is prohibited against the Government and its Officers acting in their official capacities. This immunity was emphasised by **Visram and Ibrahim, JJ** (as they were) in **Kisya Investments Ltd vs. Attorney General & Another [2005] 1 KLR 74**, as follows:

“Order 28, rules 2(1)(a), (2) and (4) of the Civil Procedure Rules subject themselves to the provisions of the Government Proceedings Act which include provisions prohibiting execution against or attachment in respect of the Government. The said Rules themselves expressly preclude such actions. In pursuance of the ends of justice the courts are bound to apply the law as it exists. Many a times such application may indeed not attain that goal due to the effect of the said laws. On the question of abuse of the process of the court, the

application of any written law cannot amount to an abuse of the process of the court however much its effect is harsh or even undesirable.... 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. SEE HALSBURY'S LAWS OF ENGLAND 4TH EDN VOL. 11 PARA 970, 971 AND 1370. 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. SEE AUCKLAND HARBOUR BOARD VS. R (1924) AC 318, 326. 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 inundated 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, ship 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."

30. It is therefore clear that apart from the fact of the existence of a judgement against the government, the law recognises that due to the special role played and the central position held by the Government in the management of the affairs of the country, there is a necessity for further proceedings to be undertaken before the judgement can be implemented.

31. However, as I held in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the Republic vs. The Attorney General & Another ex parte James Alfred Koroso:

"...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.”

32. In my view among the issues the Court has to determine is whether the sum or part of it, is still due, owing and payable.
33. In this case it is contended that the respondent paid part of the decretal sum to KRA which sum it was duty bound to pay. If that is the position, it is my view that the respondent is properly entitled to adduce evidence showing that it was under legal obligation to do so and if that is found to be the position, then it is unlikely that the Court will compel the respondent to remit further sums. However, the burden is upon the respondent to prove the existence of such legal obligation. But if the respondent decided on its own motion to pay a sum due to a judgement debtor to a third party who was not entitled to such payment, such payment, in my view, cannot be taken to have been made in settlement of the decree in question. My view is supported by the decision of the Court of Appeal in *Kenindia Assurance Company Ltd. vs. Samuel Njuguna Gitaka & Another Civil Appeal No. 130 of 1992*. In this case the facts were that the 1st respondent who was insured by the appellant lodged a claim for compensation with the appellant following an accident in which the 1st respondent’s vehicle was damaged. After the 1st respondent signed the discharge voucher, the respondent was informed that the money would be re-routed to the 2nd respondent on account of some money owed by the 1st respondent to the 2nd respondent on account of unpaid premiums. On appeal against the judgement of the High Court, the Court of Appeal expressed itself as follows:

“The fact remains that the sum of shs. 92,000/= was the first respondent’s money and the appellant had no business paying it elsewhere. The payment to the second respondent was made on an unsubstantiated presentation by Mr. Shah that the first respondent owed his company money. The appellant had no authority to act on that presentation the consequence of which is that it is obliged and liable to indemnify the appellant. In our view the learned judge was justified on the evidence before him in finding that the Exhibit E was irregular and by taking it as a calculated fraud and conspiracy to deprive the first respondent of his entitlement. Having come to that decision it was not necessary for the learned judge to fall back on the plaint and make a positive finding that fraud was not pleaded or canvassed.....Mr Nowrojee, counsel for the appellant also submitted that it was wrong for the learned judge to order the appellant to pay to the first respondent shs. 92,000/= without any order for indemnity against the second respondent when the appellant had passed the credit to the second respondent on the basis of representation from the second respondent that the first respondent owed to the second respondent a sum in excess of shs. 92,000/=. During the trial the appellant justified to the hilt its payment of the said sum to the Third Party; and even without evidence or any urging it strongly asserted that the second respondent was owed moneys by the first respondent. Without concurrence of the first respondent the appellant in collaboration with the second respondent unlawfully deprived the first respondent of his just payment and the appellant cannot now seek the assistance of the Court for reimbursement in what the trial court termed a “transaction tainted with illegality”. The perpetrator of the conspiracy was the appellant. This ground of appeal must, therefore, fail.”

34. *The question is therefore whether in the light of the allegations made by the respondent, this court ought to exercise its inherent jurisdiction to order that KRA be joined to these proceedings. As stated hereinabove, inherent jurisdiction is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice. In my view the injustice contemplated is injustice as between the parties to the proceedings before the Court. In the same vein, in Abdulmasul Haji Jooma vs. Harnam Singh Bhambra Dar-Es-Salaam HCCA NO. 3 OF 1967 [1967] EA 326, the well-known circumstances under which the court’s inherent jurisdiction is invoked was reiterated while citing *Code of Civil Procedure 10th Edn. page 434 By Mulla* on the following terms:*

“Inherent jurisdiction must be exercised subject to the rule that if the code does contain specific provisions which would meet the necessities of the case in question, such provisions should be followed and the inherent jurisdiction should not be invoked. A Court cannot make use of the special provisions of the section where the applicant has his remedy provided elsewhere in the Code and has neglected to avail himself of it. And further, no order should be made under this section unless it is necessary for the ends of justice or to prevent abuse of the process of the Court.....There was no abuse of the process of the court in the present case as there had been a consent judgement and the respondent had agreed to vacate within a certain period.”

35. *In this case, as I have stated hereinabove, if the respondent at the hearing of the application for mandamus proves that he has legally settled the decretal sum in question either by payment directly to the ex parte applicant or by fulfilling some legal obligation which the ex parte was bound to fulfil and which the respondent was legally obliged to fulfil on behalf of the ex parte applicant from the decretal sum, I assume, without deciding, that the respondent may well be off the hook as it were. In other words there is an avenue for the respondent to ventilate the issues raised herein without the necessity of subjecting this court to commence proceedings other than those contemplated under section 8 of the **Law Reform Act**.*

36. *In the result, I decline to grant the prayers sought in the Notice of Motion dated 22nd August 2013, which I hereby dismiss with costs to the ex parte applicant.*

Dated at Nairobi this 24th day of January 2014

G V ODUNGA

JUDGE

In the absence of the parties