REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION JR NUMBER 132 OF 2010

REPUBLIC…….APPLICANT

VERSUS

PERMANENT SECRETARY OFFICE OF THE PRESIDENT

MINISTRY OF INTERNAL SECURITY…….1ST RESPONDENT

CORPORAL ALPHONCE LUMOSI……2ND RESPONDENT

EX-PARTE

NASSIR MWANDIHI

JUDGEMENT

1. By a Notice of Motion dated the 17th of May 2013, the Ex-Parte applicant herein **Nassir Mwandihi** seeks the following orders:

i. **That this Honourable Court be pleased to order the Permanent Secretary in the Ministry of Internal Security (renamed Principal Secretary) in the office of the President to be committed to civil jail for contempt of court orders issued on the 10th of September, 2012**
ii. **That the costs of this Application be provided for**

EX-PARTE APPLICANTS CASE

2. A brief summary of the facts in this case are that the Ex-Parte Applicant was maliciously charged and prosecuted in Thika Criminal Case Number 2681 of 2003. Subsequently he filed a case in Thika SPMCC 601 of 2005 claiming damages for false imprisonment and malicious prosecution against the Attorney General, the 2nd Respondent and Another. The court found for the Ex-Parte Applicant and he was awarded Kshs. 150,000 in damages plus costs and interest. In June 2008 the certificate of order against the government totalling Kshs. 174,425 was issued by the court. It is the Ex-Parte Applicants case that not only has the 1st Respondent been duly notified of the judgment, decree and certificate of order but that several demands of payment have been made to the Respondents through the 1st Respondent but the Respondents have blatantly declined and/or refused to pay the decretal amount of Kshs. 174, 425.
3. Subsequently the applicant applied for an order of mandamus and upon hearing the same, the court issued an order of mandamus against the 1st Respondent compelling him to pay the aforesaid decretal amount in full and awarded costs to the Ex-Parte Applicant. The Ex-Parte Applicant

served the order of mandamus together with the Certificate of Taxation, the Thika SPMCC 601 of 2005 judgment, the Decree and a Notice upon the 1st Respondent on the 20th of September 2012 and on the Attorney General's office on the 3rd of October, 2012.

4. He adds further that on the 27th November 2012 he caused Notice of Penal consequences to be served upon the 1st Respondent and the Attorney General. He concludes that to date the accrued decretal sum of Kshs. 388,667.25 has not been paid by the Respondents and the same continues to attract an interest. It is his view that the 1st Respondent has deliberately and blatantly refused to pay the said sum of money to the Ex-Parte Applicant and is therefore disobeying a lawful court order. The Ex-Parte Applicant sought and was granted leave to file committal to jail proceedings against the 1st Respondent on 9th May 2013. It is on these grounds that the Ex-Parte Applicant now seeks to have the 1st Respondent committed tocivil jail.

1ST RESPONDENT'S CASE

5. The 1st Respondents filed grounds of opposition dated the 25th of November, 2013 in which they state that the said application is incompetent, in bad faith and unsustainable. It is the 1st Respondent's view that the prayers sought for are against Section 21(4) of the ***Government Proceedings Act*** (hereinafter referred to as the Act) which expressly prohibit execution against the government and its officers in their individual capacity. They contend that the overall benefit of having the fundamental provisions of the Act particularly Section 21(4) overrides the grounds captured in this Application.They add that the prayers sought for are unconstitutional and against the bill of rights as read together with Article 2(6) of the Constitution of Kenya 2010 and as such the Application should be dismissed with costs.

EX-PARTE APPLICANT'S SUBMISSIONS

6. It is the submission of the Ex-Parte applicant that the relevant documents were served upon the 1st Respondent as well as the Attorney General. He adds that the 1st Respondent was duly represented in court throughout this application and on diverse occasions they sought adjournments to enable them seek payment in satisfaction of the amount due and owing to the ex-parte applicant.
7. In regard to the grounds of opposition raised by the 1st Respondents, the Ex-Parte Applicant relied on Section 21(1) and (2) of the said Act and submitted that he extracted a certificate of order against the government and served the same upon the Respondents.
8. Based on section 21(3) of the Act, it was submitted that payment of damages by the Government may only be suspended where an appeal has been filed and the same is pending.
9. To the Ex-Parte Applicant execution against the government is provided for in the aforesaid sections 21 and as such the reliance on Section 21 (4) of the same act by the 1st Respondents is ill advised and misconstrued.
10. The Ex-Parte Applicant submitted that the person who should be served with the Certificate of Order against the Government is the Attorney General and that there is no requirement for personal service upon the Government officer or department as implied by the Respondent and added that he was in order when he served the Attorney general and the Ministry of Internal Security with the relevant documentation and as such the Respondent's objection of this application on grounds of service and Section 21 of the Act must fail.
11. It was submitted that by the Ex-Parte that pursuit of a remedy under statute cannot be seen to be unconstitutional and the quest for payment of an amount ordered by decree of the court cannot be said to violate the constitution or an international treaty on human rights. He added that the Constitution provides for the protection of the rights of all people including the holder of a lawful decree of a competent court. Therefore the Respondents having failed to give sufficient reason as to why they have failed to satisfy the order of the court and such failure to pay money as ordered by a lawful court cannot be protected by a court of law. In support of his submissions the applicant relied on HCCC 529 of 2010 **Ufanisi Capital Credit Ltd vs. Stephen Kipkenda Lagat& 2 Others** and **c**oncluded that there is no order and/or appeal staying the Mandamus Order issued by the court and as such it is lawful and the Respondents are legally bound to obey the same.

1ST RESPONDENTS SUBMISSIONS

12. It is the 1st Respondent's submission that Articles 28 and 29 of the Constitution of Kenya 2010 provide for the rights to human dignity and freedom of security of the person. They add further that Article 2(6) of the Constitution provides that any treaty or convention ratified by Kenya shall form part of the law of Kenya under the new Constitution as such the International Convention on Civil and Political Rights (ICCPR) which was ratified by Kenya is part and parcel of Kenyan law and it provides that no one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation. It is the 1st Respondent's submission that an order of imprisonment to civil jail is meant to punish and subject the debtor to shame and indignity and as such the process is unconstitutional and relied on **Re the Matter of Zipporah Wambui Mathara [2010] eKLR.**
13. The 1st Respondents relied on Section 21(4) of the Actand submitted that the court order for payment of damages was to the institution of the government. Therefore the alleged execution against the person of the permanent secretary in his individual capacity is illegal and unconstitutional. This, the 1st Respondents submit will be seen to protect the constitutional rights of the individual as well and the continuity of the functioning of the government.
14. The 1st Respondents submitted that the basis of the law of contempt of court in Kenya is governed by Section 5(1) of the ***Judicature Act*** and Sections 63 of the ***Civil Procedure Act***. Therefore the prevailing law however the Contempt of Court Act 1981 laws of England and under Order 52 rule 3 (1) of the said Act it is provided that

    "No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if the order is directed to a group of persons or a corporation some appropriate member has been personal served. "

15. The 1st Respondent submitted that personal service was not effected because the documents were served in the registries of the Internal Security Minister and the office of the Attorney general and an omission of procedure makes the process fatal. They conclude by stating that the application herein is unmerited and an abuse of court process.

DETERMINATION

16. I have considered the issues raised hereinabove and this is the view I form of the matter.
17. **It was, contended based on the authority of Re the Matter of Zipporah Wambui Mathara (supra) that to commit the Respondent to civil jail is unconstitutional.**
18. In determining the constitutionality of committal to civil jail, we must primarily focus on analysing the hierarchical place of international law, specifically international human rights treaty law, in the Kenyan domestic legal system in the context of the new constitutional dispensation. In **Beatrice Wanjiku & Another vs. The Attorney General** Petition 190 of 2011 it was held that:

    "**Before the promulgation of the Constitution, Kenya took a dualist approach to the application of international law. A treaty or international convention which Kenya had ratified would only apply nationally if Parliament domesticated the particular treaty or convention by passing the relevant legislation. The Constitution and in particular Article 2(5) and 2(6) gave new colour to the relationship between international law and international instruments and national law. Article 2(5) provides, ?The general rules of international law shall form part of the law of Kenya and Article 2(6) provides that ?Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."**

19. In Kenya the hierarchical issue pertaining to the international human rights norms that are entrenched in international human rights treaties vis-à-vis national legislation was adopted in the Kenyan High Court case of **Diamond Trust Kenya Ltd v Daniel Mwema Mulwa** HCCC No. 70 of 2002 (Unreported), which case also was dealing with the constitutionality of the committal to

civil jail provision in the ***Civil Procedure Act*** vis-à-vis Article 11 of ICCPR, which was incorporated into Kenyan law through Article 2(6) of the Constitution. The Court held as follows:

"We have in this country a three tier hierarchy of the law. At the apex is the Constitution of Kenya, which is the supreme law of the land, to which all other laws are subservient. Next in rank are Acts of Parliament, followed by subsidiary legislation at the bottom of the pile. The Civil Procedure Act is an Act of Parliament which provides for procedure in Civil Courts. Section 40 thereof makes provision for the arrest and detention of judgment debtors ... To the extent that this Section provides for the arrest and detention of a judgment-debtor; it is clearly in conflict with Article 11 of the [ICCPR]. The two are contradictory. This raises several issues. Can the two provisions co-exist? If so, how can they operate side by side? And if any cannot co-exist, which of them should take precedence over the other? In my view, article 11 of the [ICCPR] cannot rank paripassu with the Constitution. The highest rank it can possibly enjoy is that of an Act of Parliament. And even if it ranks in parity with an Act of Parliament, it cannot oust the application of section 40 of the Civil Procedure Act. Nor for that matter, can it render section 40 unconstitutional. For that reason for as long as section 40 remains in the statute book, it is not unconstitutional for a judgment-debtor to be committed to a civil jail upon his failure to pay his debts. Since, however, section 40 is at variance with the provisions of an International Convention which is part of the law of Kenya, it follows that we now have two conflicting laws, none of which is superior to the other."

20. The Learned Judge went ahead and stated in **Beatrice Wanjiku Case** (supra) that:

"**The Civil Procedure Act and the Rules provide a legal regime for arrest and committal as a means of enforcement of a judgment debt. Article 11 f the Convention states that, "No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation."[Emphasis mine]I read the merely as used above to mean that one cannot be imprisoned for the sole reason of inability to fulfil a contractual obligation. It means that additional reasons other than inability to pay should exist for one to be imprisoned. Article 11 recognises that in fact there may be instances where imprisonment for inability to fulfil a contractual obligation may be permitted. As there is no inconsistency between Article 11of the Convention and the general tenor of the committal regime under Civil Procedure Act and the Rule, the provisions of Article 11 of the Convention are at best an interpretative aid.**

21. In **Jayne Wangui Gachoka vs. Kenya Commercial Bank** Petition Number 51 of 2010 it was held:

"The deprivation of liberty sanctioned by sections 38 and 40 of the Civil Procedure Act is permissible and is not in violation of either the Constitution or the ICCPR. The caveat, however, which has been emphasized in all the cases set out above, is that before a person can be committed to civil jail for non-payment of a debt, there must be strict adherence to the procedures laid down in the Civil Procedure Act and Rules, which provide the due process safeguards essential to making the limitation of the right to liberty permitted in this case acceptable in a free and democratic society."

22. Similarly, in **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743** it was held:

"Fundamental rights cannot be enjoyed in isolation and by selected few while they trample on others or tread upon their rights since the enjoyment of fundamental rights and freedoms contemplates mutuality and an atmosphere of respect for law and order including the rights of others and the upholding of the public interest…… The function of the Court when faced with the task of establishing or determining the rights on the one hand and determining the limitation and restrictions on the other hand is to do a balancing act and in this balancing act are principle values, objectives to be attained, a sense of proportionality and public

interest and public policy considerations…… There cannot be a cause of action based on a lawful exercise of the right of execution by interested parties since it is a serious contradiction to suggest that creditors who are enforcing their rights under the private law should be stopped from so doing because there are allegations of violations of the Constitution by the state or Government."

23. The same issue was dealt with by **Nyamu, J** (as he then was and **Wendoh, J** in **Braeburn Limited vs. Gachoka and Another [2007] 2 EA 67** where the Court expressed itself eloquently in my view as follows:

"To determine whether the right to liberty is limited by the law prescribed, and that the person whose liberty is circumscribed has been subjected to due process under that law an independent and impartial court established by the law as per section 77(1) and 77(7), this Court must examine the concerned law in the light of section 84(1) of the Constitution to establish that both the substantive and procedural law under which a person may be deprived of his liberty, itself meets with the constitutional safeguards under those provisions of the Constitution and in a manner justifiable in a democratic society……Rules 18 and 32 of Order 21 of the Civil Procedure Rules do meet and in a very special way in relation to a debtor surpass the standard laid down in the Constitution for the deprivation of a person's liberty. This is so because the deprivation of a person's liberty whether for contempt of court (under section 72(1)(b) of the Constitution), or for default to pay a money decree, is in the nature of criminal proceedings and for a person to suffer the loss of liberty, it must be in the words of that hackneyed phrase, be proved beyond reasonable doubt, that he has the means to pay but that he has refused and/or neglected to pay……To Conform with that high standard proof, the discretion conferred upon the court to either issue a warrant of arrest and instead issue a notice calling upon the judgement to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison, must be construed, strictly, that is to say mandatorily, that upon an application by a decree holder for execution of a money decree by way of arrest and committal to prison the court to which an application is made for issue of a warrant of arrest shall in the instance first issue a notice to the judgement debtor to appear in court and show cause why he should not firstly be arrested, and secondly, committed to prison. That is the first step towards the execution of a decree for payment of money……..The second step is the examination of the judgement debtor when he appears in court. Of course if he does not appear, the court issuing the notice in the first instance is at liberty to issue a warrant of arrest and if arrested, the judgement debtor may be detained in prison pending his appearance in court and may be released upon provision of security to ensure his attendance or appearance in court…….If however the debtor appears to the notice to show cause, which is mandatory, in terms of the said Order 21, rule 35, or pursuant to his arrest and appearance before he can be committed to prison, it is the duty of the decree holder (who has sought the arrest and committal of the judgement debtor to prison) to satisfy the court that the judgement debtor is not suffering from poverty or any other sufficient cause and is able to pay the decretal sum that: (i) the judgement debtor, with the object or effect of obstructing or delaying the execution of the decree: (a) is likely to abscond or leave the local limits of jurisdiction of the Court; (b) has, after the institution of the suit, in which the decree was passed, dishonestly transferred, concealed or removed any party of his property or committed any other act of bad faith in relation to his property; or (ii) the judgement-debtor has or has had since the date of the decree , the means to pay the amount of the decree, or some substantial part thereof and refuses or neglects or has refused or neglected, to pay the same, but in calculating such means there shall be left out of account any property which is exempted from attachment, in execution of the decree; or (iii) that the decree is for a sum for which the judgement-debtor was bound in a fiduciary capacity to account (trustees or persons holding moneys in a professional capacity or in trust)…….In essence, the judgement debtor should be examined in the manner envisaged in Order 21, rule 36 as to the debtor's total wealth and indebtedness to determine the judgement debtor's total ability or inability to pay and whether such inability to pay is from poverty or other sufficient cause. It is only after the

court is satisfied of these matters, after subjecting the judgement-debtor to due process in the manner construed, the requirements of mandatory notice, before a warrant of arrest may be issued for his arrest and compulsion to attend or appear before a court can decree for payment of a money debt be executed upon a judgement debtor by way of arrest and committal to prison…….The execution of a judgement decree by way of arrest and committal to prison is extreme in nature. It deprives a citizen of his liberty, to do so, the highest standards, that is to say, the constitutional safeguards as to due process by way of notice of intended execution of the decree by way of arrest and committal be given to the judgement debtor as a first step and as a second step, a due inquiry and satisfaction to the court, by the decree holder, as to judgement debtor's ability to pay and refusal and/or neglect to pay, and therefore the necessity to punish him for contempt of a court order by depriving him of his liberty…..It is clear under both section 38 of the Civil Procedure Act and Order 21, rule 35(1) that no judgement-debtor will, on account of his inability from poverty or other sufficient reason, be arrested and committed to prison…..The section is not vindictive and the Court, in the exercise of its discretion would not order the imprisonment of a defaulting trustee unless it was likely to be productive of payment……The provisions of sections 38, 40 and 42 of the Civil Procedure Act, and Order 21, rules 32 and 35 of the Civil Procedure Rules are neither inconsistent with the provisions of the relevant provisions of the Constitution nor are they in conflict with any of the provisions of the International Bill of Human Rights. It is further held that provided the procedure under the Civil Procedure Act and Order 21, rules 32 and 35 is followed in the manner outlined herein, the requirements of due process comparable to that in section 77(1) and 77(9) of the Constitution is guaranteed."

24. It is therefore clear that even in normal execution of decrees by committal to civil jail, as long as the safeguards under the relevant provisions of the ***Civil Procedure Act*** and the Rules made thereunder are complied with an objection on the constitutionality of the procedure would not be upheld.
25. It is not in doubt that section 21(4) of the***Government Proceedings Act*** prohibits execution against the Government. However Section 21 (1) of the Act provides:

"Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:

Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant."

26. Section 21 (3) of the said Act on the other hand provides:

*"**If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:***

Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein."

27. The effect of these provisions is that whereas execution proceedings as are known to law are not available against the Government, the accounting officer for the Government department concerned is nevertheless under a statutory duty to satisfy a judgement made by the Court against that department. As was heldby **Lord Goddard C. J.**in the English case of **R (Regina) vs. Dudsheath, ex parte, Meredith [1950] 2 ALL E.R. 741, at 743,** *Mandamus is neither a writ of course nor a writ of right, but will be granted if the duty is in the nature of a public duty, and specially affects the rights of an individual, provided there is no more appropriate remedy.* See also **Republic vs. Town Clerk, Kisumu Municipality, Ex Parte East African Engineering Consultants[2007] 2 EA 441**.
28. This procedure was dealt with extensively in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** where **Goudie, J** eloquently, in my view, expressed himself, which expression I fully associate myself with, *inter alia*, as follows:

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

grant a *mandamus* that justice may be done. The construction of that sentence is this: where there is no specific remedy and by reason of the want of specific remedy justice cannot be done unless a *mandamus* is to go, then *mandamus* will go… In the present case it is conceded that if *mandamus* was refused, there was no other legal remedy open to the applicant. It was also admitted that there were no alternative instructions as to the manner in which, if at all, the Government proposed to satisfy the applicant's decree. It is sufficient for the duty to be owed to the public at large. The prosecutor of the writ of *mandamus* must be clothed with a clear legal right to something which is properly the subject of the writ, or a legal right by virtue of an Act of Parliament…..In the court's view the granting of *mandamus* against the Government would not be to give any relief against the Government which could not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

29. Section 21(4) of the ***Government Proceedings Act*** Cap 40 Laws of Kenya provides:

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

30. However the preamble to Cap 40 provides that it is "*An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters*".
31. It follows that Cap 40 only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. With respect to judicial review proceedings, it has been held time without a number that such proceedings are neither criminal nor civil. See **Jotham Mulati Welamondi vs. The Electoral Commission of Kenya Bungoma H.C. Misc. Appl. No. 81 of 2002 [2002] 1 KLR 4.**
32. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another *ex parte* James Alfred Koroso** I expressed myself as 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 nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

33. It therefore follows from the foregoing discourse that the rules applicable to normal execution proceedings by way of committal to civil jail are not necessarily applicable to enforcement of an order of the Court arising from an order of mandamus by way of committal. It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule. See **The District Commissioner Kiambu vs. R and Others Ex Parte Ethan Njau Civil Appeal No. 2 of 1960 [1960] EA 109; R vs. The Brecknock And Abergavenny Canal Co. 111 ER 395** and **R vs. The Bristol and Exeter Railway Co 114 ER 859.**
34. The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court. The rationale for the immunity against normal execution proceedings and by extension the said elaborate procedure was explained 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 ENGALAND 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 inudated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plants and equipment will be attached, its furniture and office equipment will be attached, its vehicles, aircraft, 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."

35. 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.
36. Where a party has complied with all the procedures leading to the grant of an order of mandamus to subject the party to the normal procedures relating to contempt of court proceedings would engender a miscarriage of justice yet Article 159(2)(b) mandates that justice ought not to be delayed. To take a successful litigant in circles when adequate notices have been given to the Government to settle a decree would be to turn the legal process into a theatre of the absurd.
37. Accordingly I do not agree with the submissions made by the Respondent that even after an order of mandamus is issued the decree holder ought to be subjected to the technicalities of personal service and the penal notice. Such requirements are necessary in my view in the usual application for contempt where but not in judicial review orders of mandamus compelling a public officer to carry out a duty imposed by statute.
38. Accordingly, no compelling reason has been advanced by the Respondent why this application which is otherwise merited ought not to be granted.

ORDER

39. Accordingly, I direct that the Respondent appears before this Court either in person or by a legal representative to show cause a warrant of arrest ought not to issue for his arrest with a view to committing him to civil jail.

Dated at Nairobi this 3rd day of April 2014

G V ODUNGA

JUDGE

Delivered in the presence of Mr Mogere for Mrs Maira for the applicant