REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & JUDICIAL REVIEW DIVISION

HC MISC. NO. 316 OF 2008

IN THE MATTER OF AN APPLICATION BY MOHAMUD MUHUMED SIRAT FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AND PROHIBITION AGAINST THE MINISTER FOR IMMIGRATION AND REGISTRATION OF PERSONS AND THE HONOURABLE ATTORNEY GENERAL

AND

IN THE MATTER OF THE IMMIGRATION ACT, CAP 172 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF PERSONS ACT, CAP 107 OF THE LAWS OF KENYA

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE LAW REFORM ACT, CAP 26, LAWS OF KENYA

AND

IN THE MATTER OF ORDER LIII OF THE CIVIL PROCEDURE RULES

BETWEEN

REPUBLIC .....APPLICANT

VERSUS

HON. OTIENO KAJWANG' THE MINISTER FOR IMMIGRATION

AND REGISTRATION OF PERSONS.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

EX - PARTE.....MOHAMED MUHUMED SIRAT

RULING

1. This ruling is the subject of two applications. The first application is a reference brought on behalf of the interested party herein, **Abdirahman Ali Hassan**, by way of Chamber Summons premised substantially under Rule 11(2) of the ***Advocates (Remuneration) Order*** and seeks the following orders:

1. **THAT, this application be certified urgent and service be dispensed with in the first instance.**

2. **THAT, there be a stay of execution pending the inter partes hearing of hits application in the first instance, pending the hearing and determination of the application or until further orders of this Honourable Court.**

3. **THAT this Honourable Court be pleased to set aside the Taxing Officer's decision and ruling delivered on 2nd July 2010 in the taxation of the Bill of Costs dated 1st February 2010;**

4. **THAT the Bill of Costs be remitted for taxation afresh by a different Taxing Officer;**

5. **THAT the costs of this application be provided for.**

2. The said application is based on the following grounds:

i. **The Taxing Officer has failed and/or refused to give reasons for his Ruling despite a requests by the Interested Party;**

ii. **The failure by the Taxing Officer to furnish reasons for his decision is a proper ground for lodging a competent reference against such decision and for setting aside the decision of the Deputy Registrar;**

iii. **The Taxing Officer misdirected himself and acted contrary to established and well settled principles of law on taxation of Judicial Review cases;**

iv. **The Ex Parte Applicant has now proceeded to proclaim the Interested Parties goods on 6th December 2010.**

v. **There is currently an Order of Stay issued on 22nd October 2010 on application by the Attorney General and therefore the execution against the Interested Party is irregular.**

vi. **It is only fair and just that there be a stay of execution as prayed for in the application field herewith.**

2. The application is supported by an affidavit sworn by the said interested party on 9th December 2010. According to the deponent, Judgment was delivered by the **Honourable Justice Dulu** in this matter on **9th October 2009** and being aggrieved by the decision of the learned Judge he instructed his Advocates on record to file an Appeal against the part of the Judgement condemning him to pay one third (1/3) of the Costs. The Ex Parte Applicant then filed its Bill of Costs dated **1st**

February 2010 on **4th February 2010 and** a ruling on taxation of the Advocates/Respondent firm's Bill of Costs was delivered on 2nd July 2010. However, despite requests dated **5th July 2010** and **6th August 2010** Deputy Registrar who was the taxing office is yet to provide reasons for his ruling of **2nd July 2010**. In his view, the failure on the part of the Deputy Registrar to consider the submissions by the Interested Party and to give reasons constitutes an error of principle which would entitle this Honourable Court to interfere and set aside the taxation on the Ex Parte Applicants Bill of Costs. It is further deposed that this Honourable Court issued a Stay of execution on the application of the Attorney General on **22nd October 2010**. According to the deponent, despite the Order staying execution on an application challenging the taxation of costs herein, the Ex Pare Applicant proclaimed his goods through the firm of **Keysian Auctioneers** and as there was an order staying execution still in force, the execution is irregular and unlawful.

3. In response to this application the ex parte applicant, **Mahamud Muhumed Sirat**, on 1st March 2011 swore a replying affidavit in which he deposed that the application is tailored to delay the determination of this matter. In his view, if a party objects to a decision on taxation of a Party to Party Bill of costs, he must comply with the procedure laid down in the ***Advocates Remuneration Order*** (hereinafter referred to as the Order). In his view the judgement that ordered the Interested Party to pay none-third of the costs in this suit should be honoured as it has not been stayed and that the Interested Party's reliance on the order dated 22nd October 2010, to persuade the Court to grant him stay of execution was without merit or legal basis. It is further deposed that the Interested Party did not apply for stay of execution of the Certificate of Costs hence the Court ought to lift the stay order dated 10th December 2010 so that he can enjoy the fruits of the judgement made in his favour. It is the ex parte applicant's position that the costs payable by the respondents and the interested party to him are not joint but are verifiable and distinct. It is contended that the interested party did not file any submissions in objection to the taxation of the Bill of Costs.
4. The second application is a Chamber Summons dated 21st October, 2010 filed in this Court on 21st October, 2010, by the Respondents in this Miscellaneous Application seek the following orders:

1. **THAT in the first instance service of this application be dispensed with**

2. **The Honourable Court be pleased to make an order of stay of execution pending the hearing & determination of the entire application.**

3. **The Honourable court be pleased to make an order setting aside the execution process, recalling the warrant of attachment issued to the Auctioneers and thereby nullify the attachment of the applicant's personal movables.**

4. **The Honourable Court be pleased further rot make an order setting aside the proceedings and order of the taxing master against the applicant herein.**

5. **The Honourable Court be pleased to make an order directing the respondent herein to compensate the 1st applicant for the unwarranted embarrassment caused by unlawful attachment.**

6. **The Honourable Court be pleased to condemn the respondent's Advocate on record to pay both costs of this application and costs if any, of the execution.**

7. **Such further order(s) as the Honourable Court deems fit in the circumstances.**

3. The application is based on the following grounds:

a. **THAT the respondent proceeded to tax the bill of costs and is executing the same against the applicant personally without having served him with the bill of costs or notice of taxation.**

b. **The bill of costs ought not to have been taxed and executed as if the applicant was sued in his personal capacity.**

c. **The entire process of taxation and initiated mode of execution is malicious in bad faith and wholly an abuse of the process of the Court.**

d. **That no execution or attachment or any process sin the nature thereof should whatsoever be issued out by any Court to enforce payment by the Government of any money or costs due to anybody.**

e. **It is trite law that no persons shall be individually liable under any order of the payment by the Government Department or any officer of the Government as such, of any money or costs.**

f. **The respondents' Advocate through misrepresentation and active concealment of material facts hoodwinked the taxing master and the executing Court to proceed and issue warrants of attachment as if the applicant was sued in his individual capacity.**

g. **The warrants of attachment were issued against the applicant without sufficient grounds.**

h. **The bill of costs taxed ex parte is highly exaggerated, unfair and amount to gross miscarriage of justice.**

4. The application is supported by an affidavit sworn by **Hon Otieno Kajwang**, the 1st respondent herein on 21st October 2010.
5. According to the deponent, this Judicial Review application was instituted against a decision the deponent made in exercise of his statutory powers under the ***Immigration Act*** CAP 172 Laws of Kenya and though no formal order or decree was extracted and served upon him or the Authorized and the Accounting officer of the Ministry, he was been informed by the office of the Attorney General that in the judgment of **Justice Dulu** delivered on 9th October, 2009 it was ordered that the respondents and the interested party to pay costs with the interested party paying 1/3 of the costs. According to him, he is not aware and has never been served with any document or made privy to any subsequent proceedings whether against him personally or in the application generally and specifically he has never been served with any bill of costs or any notice of taxation against him. He was therefore totally surprised by auctioneers who embarrassingly invaded his residential house and proclaimed his household goods on the 13th October, 2010 without any prior notice or demand made for the purported decretal sum of Kshs.1,152,476.00. In his view, any settlement or execution of any decree emanating from the aforesaid judgment ought to abide with the provisions of the Government Proceedings Act and the Law Reform Act and no short cut would suffice. According to the deponent, in this case the applicant has been fully represented by an advocate who is equally fully aware that the Judicial Review application as instituted to quash a statutory decision made in his capacity as a State Officer hence any execution directed to his personally is tainted with malice and clearly informed by a personalized opinion with a view to cause embarrassment to him and his household. He further deposed that it is not clear to him at what sage the applicant altered the course of the proceedings to warrant execution against him personally but even if that be the case, which he highly doubt, he would have been made privy to such subsequent proceedings and personally served with the Bill of costs and the notice of taxation to avoid being condemned unheard. It was further his view that the entire execution process including the warrant of attachment issued are tainted with the illegality and wholly premature as no Certificate of Costs against the Government to the best of his knowledge had been taken out and the same ought to be nullified *ex-debito justitiae* by the Honourable Court. He contended that the application for execution for warrants of attachment has not only been made in bad faith but also in blatant abuse of the process of the court and the applicant and his advocate ought to be condemned to pay costs of setting aside the same.
6. In his submissions in respect of the application dated 9th December 2010 the interested party contended that the Taxing Officer provided reasons for his decision on 17th August 2011 after the

application had been filed. It was submitted that the Taxing Officer had misdirected himself and acted contrary to to established and well settled principles of law on taxation of Judicial Review cases. Citing **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board Civil Appeal No. 220 of 2004 [2005] 1 KLR 528**, it was submitted that on a reference to a Judge from the taxation by the Taxing Officer, the judge will not normally interfere with the exercise of discretion by the taxing officer unless the taxing officer erred in principle in assessing the costs. Reference was further made to **Arthur vs. Nyeri Electricity Undertaking [1961] EA 492** and **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 Others [2006] eKLR**.

7. On the issue of seriousness of the matter, it was submitted that as the Court did not determine the nationality of the ex parte applicant the Taxing Officer grossly erred in principle by considering that a factor that the Court had ruled was not within the scope of a Judicial Review Application.
8. With respect to the complexity of the matter, it was submitted that the Court only identified three main issues for the determination one being whether the application was competent; two, whether the 1st respondent acted within its statutory power; and lastly, whether the applicant was entitled to the orders sought. It is submitted that these issues are far from complex and that the matter was a judicial review cause just like any other and hence was quite ordinary and did not raise any novel points or issues that would require extraneous research on the applicable laws beyond the usual input that the Respondent's advocates would employ while carrying out the responsibilities entrusted to them. Citing **First American Bank of Kenya vs. Shah and Others [2002] 1 EA 64**, it is submitted that whereas the increase of instructions fees is a matter for the discretion of the Taxing Master, the decision must be exercised rationally and the fact that research was done on the law before putting up pleadings is not one of the factors to be taken into account in increasing instructions fees since in doing so the party has done no more than is expected and it is nothing extra ordinary as research is not necessarily indicative of the complexity of the matter but may well be indicative of the advocate's unfamiliarity with basic principles of law which should not be turned into an advantage against the adversary. It was therefore submitted that the Taxing Officer erred in principle by giving un-due regard to the time and research employed by the ex parte applicant's advocates in the matter.
9. While citing Part 1 of Schedule VI of the Order, it was submitted that the Taxing Officer did not take into consideration all the relevant factors before using his discretion and that his failure to do so amounts to an error of principle and reliance was placed on **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board** (supra). The case of **Danson Mutuku Muema vs. Julius Muthoka Muema & Others Civil Appeal No. 6 of 1991** was also cited in which the Court held that whereas the Court was entirely right to give the costs within its discretion, the amount allowed being ten times the sum provided for, the Court did not think the said sum was reasonable and found that it was definitely excessive as opposed to three or four times. The Court further found that since the Taxing Officer was bound to give reasons for exercising his discretion and as none were given in his ruling save to say that he simply exercised his discretion, it was just and fair to set aside the sum he allowed.
10. It was submitted that in this case the minimum set in the said Order is Kshs 28,000.00 yet the Taxing Officer allowed around forty times more of the sum provided for which sum was neither reasonable, consistent nor fair and was excessive and intended to unjustly enrich the Respondents advocates. In the interested party's view the Taxing Officer's award is so manifestly excessive that it amounts to an error in principle and warrants interference by the Court and **Premchand Raichand Ltd & Another vs. Quarry Services of East Africa Ltd & Others [1972] EA 162** was relied upon. As the above principles especially the principle that the successful party is not to be allowed to make a profit out of the practice of the advocates, it was submitted that in the interest of justice the award be set aside and that the Court ought to re-assess the instruction fees at Kshs 100,000.00 or Kshs 112,000.00 based on **Danson Mutuku Muema vs. Julius Muthoka Muema & Others** (supra).
11. In his submissions filed in opposition to the application dated 9th December 2010, the ex parte applicant contends that the interested party having requested for the Taxing Officer's reasons for his decision as required under paragraph 11(1) of the Order the interested party ought to have filed a competent reference before the Court Fourteen days after the Taxing Officer gave his reasons on 17th August 2011. It is submitted that the application dated 9th December 2010 was

prompted by the fact that the ex parte applicant was in the process of executing his decree and the interested party filed an application seeking stay of execution and an interim order for stay of execution was granted on 10th December 2010 pending the hearing of the application. In the ex parte applicant's view the applicant was filed to procure stay of execution and not an appeal or objection to the taxation as at the time of the filing of the application the Taxing Office had not yet furnished the reasons for the decision. Based on **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board** (supra), it is submitted that a reference can only be filed before issuance of the Taxing Officer's reasons in exceptional circumstances where the Taxing Officer has totally refused to provide any reasons for his decisions. It is however submitted that in this case there was no total refusal by the Taxing Officer to furnish the Interested Party with his reasons for his decision and that even though there was a delay in issuing the said reasons, they were issued on 17th August 2011 before this application was heard and determined and as this application was grounded on the failure to give reasons, the same was rendered incompetent as it was overtaken by events and the interested party ought to have filed a proper reference within fourteen days after the reasons were issued. As it would be improper for the Court to disregard the said reasons hence the application is incompetent and ought to be dismissed.

12. It is further submitted based on **Kipkorir, Titoo & Kiara Advocates vs. Deposit Protection Fund Board** (supra) and **Arthur vs. Nyeri Electricity Undertaking** (supra), that the discretion of the Taxing Officer is rarely interfered with and only happens in exceptional circumstances where the Taxing Officer erred in principle in assessing the costs since questions solely on quantum are regarded as matters with which the taxing officers are particularly fitted to deal.
13. Based on **Green Hills Investments Ltd vs. China National Complete Plant Export Corporation T/A Covec [2004] 1 KLR 74**, it was submitted that the Taxing Master is given discretion to award what is reasonable and that discretion ought to be exercised within reason, fairly and judiciously and that some valid reasons or explanations must be given for the award of a specific sum. In the ex parte applicant's view, the award of Kshs 1,000,000.00 as instructions fees was reasonable, judicious and fair and that the Taxing Master applied the requisite principles in awarding the costs as outlined in the Order which includes the complexity of the matter, the seriousness of the matter, the importance of the matter to the parties, the general conduct of the proceedings and the urgency of the matter.
14. The ex parte applicant submits that the matter was complex as he was allegedly accused of being a prohibited immigrant under section 3(1) of the ***Immigration Act*** Cap 172 Laws of Kenya and that he had been declared a threat to national security under section 8 of the ***Immigration Act***. Since the offences that the ex parte applicant was accused of were only applicable to non-citizens, his counsel had to research on these accusations presented by the 1st and 2nd respondents in a bid to protect the ex parte applicant from deportation and losing his Kenyan Citizenship and further there was an element of urgency to move the Court and procure the orders due to the fact that the ex parte applicant was in custody awaiting deportation. According to the ex parte applicant these were the guiding factors that the Taxing Master applied when he made his award and the same should be preserved. Although the Order of 2006 set the minimum fees for prerogative orders at Kshs 28,000.00 it is submitted that this is and remains the minimum and not the basic fees and the Taxing Office is then invited to apply his experience and discretion to reach a reasonable award since, unlike other monetary civil claims, Prerogative orders has no monetary value and the Taxing Master is called to exercise his discretion upon considering the necessary guidelines and principles to arrive at a just and reasonable award. In the interested party's view, the award of Kshs 1,149,851/- shall not be borne by the interested party alone and that he was condemned to pay a third of the award which is Kshs 383,284/-. According to the ex parte applicant the interested party has failed to demonstrate how the Taxing Master erred in principle and acted unreasonably and that the interested party ought to have outlined all the relevant factors and considerations that the Taxing Master ought to have considered but omitted or failed to consider before exercising his discretion and that it is imperative to demonstrate how the element of unreasonableness was applicable in the taxing master's exercise of his discretion instead of merely supporting the allegation with an authority. As opposed to the decision in **Republic vs. Minister for Agriculture & 2 Others ex parte Samuel Muchiri W'njuguna & 6 Others** (supra) where an award of Kshs 20,000,000.00 was made where the minimum was 20,000.00, in this case the award was only Kshs 1,000,000.00 which was not excessive hence the Court ought to find that an

award of Kshs 1,000,000.00 which was made as opposed to Kshs 5,000,000.00 sought was neither contemptuously low nor on the higher side and dismiss the application.

15. With respect to the application dated 21st October 2010, it was submitted that under section 21(4) of the ***Government Proceedings Act***, Cap 40, the Respondent/Applicant's property could not be attached in the circumstances as the orders he gave were in his official capacity and not in his personal capacity. It was therefore submitted that it was wrong for the ex parte applicant to attach the respondent's personal property as he did as any settlement or execution of any decree emanating from the said judgement ought to abide with the provisions of the ***Government Proceedings Act*** under which no person is individually liable under any order for the payment by the Government Department or any officer of the Government as such of any money or costs.
16. It is further submitted that the warrant of attachment was made in bad faith as the respondent's persona goods ere proclaimed for the full decretal amount though the respondents were only to bear 2/3 of the amount. Further the ex parte applicant through misrepresentation and active concealment of material facts hoodwinked the taxing master and the executing Court to proceed and issue warrants of attachment as if the respondent was sued in his individual capacity. Further the warrants of attachment were issued without sufficient grounds since no formal order or decree was extracted and served on the 1st Respondent and the proclamation was carried out without prior notice or demand made for the purported decretal sum. Since the applicant altered the course of the proceedings it is submitted that the entire process including the warrant of attachment issued is tainted with illegality and wholly premature hence an abuse of the process of Court process.
17. It is further submitted that there was no lawful request for payment as the respondent was never served with certificate of costs against the Government or the decree which are requisite documents to be presented before payment is made.
18. It was further submitted that the costs awarded were excessive and extravagant in the circumstances hence the Court ought to reduce the amount granted, compensate the respondent for the unwarranted embarrassment caused by the unlawful attachment and pay the costs of the application.
19. In his response to the application dated 21st October 2010, the ex parte applicant submitted that prayer 4 of the application seeking to set aside the proceedings and the order of the taxing master against the respondent is an appeal in disguise against the decision of the Taxing Master and is misplaced and ought not to be considered by the Court as the same amounts to an abuse of the Court process. In the ex parte applicant's view, having obtained ex parte orders of stay on 22nd October 2010 the 1st respondent made no attempt to prosecute its application which was prejudicial to the ex parte applicant since it prevented him from enjoying the fruits of his judgement. Having not invoked the procedure under paragraph 11 of the Order by filing a reference within 14 days from the Taxing Masters decision, it was submitted that the application does not qualify as a reference and in the circumstances the respondent is not entitled to stay as there is no pending appeal against the Taxing Master's decision. To the ex parte applicant the 1st respondent cannot circumvent the proper remedial measures that were available to him and which he failed to take advantage of hence the application is an abuse of the process of the Court. It is further submitted that the judgement itself awarding costs has never been stayed or appealed against and the certificate of costs has never been stayed despite notification of the same. As the 1st respondent has always been a party to the proceedings and the order for costs was made against him, the 2nd respondent and the interested party, it was submitted that the 1st respondent is under liability to pay the costs which costs despite service of the Bill of Costs on him, he failed to oppose. The Court was therefore urged to deny the applicants the costs of the application.
20. I have considered the foregoing. I propose to dispose of the application dated 9th December 2010 first. The only relevant prayers for the purposes of this ruling are prayers 3 and 4 of the said application. The first issue for consideration is whether the application is properly before the Court. Under the provisions of Paragraph 11 of the Order:

1. ***Should any party object to the decision of the taxing officer, he may within fourteen days after the decision give notice in writing to the taxing officer of the items of taxation to which he object.***
2. ***The taxing officer shall forthwith record and forward to the objector the reasons for his***

decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by chamber summons, which shall be served on all the parties concerned, setting out the grounds of his objection.

21. In this case the request for the reasons for taxation was made on 5th July 2010 and the application dated 9th December 2010 was filed on 10th December 2010. In **Evans Thiga Gaturu, Advocate vs. Kenya Commercial Bank Limited High Court (Milimani Commercial And Admiralty Division) Misc. Appl. No. 343 of 2011,** I expressed myself *inter alia* as follows:

"In my own view, where no reasons appear on the face of the decision of the taxing master, it is only prudent that such reasons be furnished in order for the Judge to make an informed decision as to whether or not the discretion of the taxing master was exercised on sound legal principles. However, where there are reasons on the face of the decision, it would be futile to expect the taxing officer to furnish further reasons. The sufficiency or otherwise is not necessarily a bar to the filing of the reference since that insufficiency may be the very reason for preferring a reference. Otherwise mere adherence to the procedure may lead to absurd results if the advocate was to continue waiting for reasons, as it happened in the case of *Kerandi Manduku & Company vs. Gathecha Holdings Limited Nairobi (Milimani) HCMA No. 202 of 2005*, where the taxing officer had left the judiciary. Where reasons are contained in the decision, I share the view that to file the reference more than 14 days after the delivery of the same would render the reference incompetent. In the present case, the ruling on taxation was made on 6th July 2011. If the client considered the said decision to contain the reasons, he could file the reference within 14 days from the date thereof. If, on the other hand, he was of the view that there were no reasons contained in the decision, he could request for the same in writing, in which case, he would be bound to wait for the same. If, however, at a later stage he decided to prefer the reference notwithstanding the failure by the Taxing Master, after the lapse of the 14 day period, it is my view that he would be bound to apply for extension of time under paragraph 11(4) of the Remuneration Order, in which case one of the grounds if not the only ground would be the failure by the Taxing Master to furnish him with the reasons which, according to the decision in Kipkorir, Titoo & Kiara Advocates (ibid), is a ground for allowing a reference. However, a party would not be entitled to an indefinite period within which to prefer a reference simply because the reasons were not given if even by the time of making the same reference, the said reasons have not been furnished. I, accordingly, find that as the client filed the reference outside the 14 days of the delivery of the decision and before being furnished with the reasons, the reference is incompetent for being out of time and/or being prematurely instituted. I accordingly strike out the Chamber Summons dated 18th January, 2012 but make no order as to costs since the problem has been partly caused by inaction on the part of the court."

22. In this case it is clear that the application was filed way out of the 14 days period stipulated under the said paragraph 11. No extension of time was sought. It is therefore my view and I so hold that the application dated 9th December 2010 is incompetent and is hereby struck out with costs to the ex parte applicant.

23. With respect to the application dated 21st October 2010, section 21(4) of the Government Proceedings Act Cap 40 Laws of Kenya provides as follows:

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.

24. The above provision clearly bars individual liability for orders of payment by the Government, Government department or Government Officer and further bars execution or attachment against the Government. It is my view that where the Government is found to be liable in civil

proceedings the only mode of realising the fruits of judgement is by way of an order of mandamus. As I said in High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another *ex parte* James Alfred Kosoro**:

"…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."

25. The rationale for the provision barring execution against the Government was stated 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."

26. In these proceedings it is clear that the 1st respondent was sued in his capacity as The Minister for Immigration and Registration of Persons. Needless to say he was an officer of the Government and under section 21(4) of the ***Government Proceedings Act*** could not be personally liable in costs arising from these proceedings. Any execution against him was clearly unlawful and was untenable.
27. Apart from the foregoing, I have perused the Court file and there is no order or endorsement on the file which triggered the execution process. On receipt of an application for execution, the court should make an order pursuant thereto as required under the provisions of **Order 22 Rule 13(4)** of the Civil Procedure Rules. In the case of **Mandavia vs. Rattan Singh Civil Appeal No. 27 of 1967 [1968] EA 146 Duffus, JA** stated that:

" The words "formal order for attachment and sale of property may be made by the Registrar" in Order 48, rule 3 must mean that the Registrar has to actually consider the application before him and then make the necessary orders to effect the attachment of the sale. Formal order here does not mean that the registrar has only to prepare and issue a formal order which has in fact already been made by the judge, as for instance whether he

draws and signs a decree after the judgement or as in this case an order after the judge has decided an application. In such cases, the registrar does not "make" the order, he only prepares the order already "made" by the judge. Rule 3 must empower the Registrar to consider the proceedings before him and then in his discretion himself make an order. In a sense this will usually only be a formal order as a judgement has already been obtained and, if not settled, execution against the judgement debtor's property will follow as a matter of course without dispute, and the rule goes on to make it clear that if any dispute arise, then on the objection being taken in the manner provided, the matter will be taken over and dealt with by a judge. Order 48, rule 4 provides that for the purposes of rules 2 and 3 the registrar shall be deemed a civil court, so that in effect a registrar sitting to deal with applications or proceedings under rule 3 would be the presiding officer of a civil court, and a civil court here must mean a tribunal where civil issues are settled and not just a body that is only going to put into formal phraseology an order already made on an issue tried and disposed of by a judge. Form 27 in Appendix D of the schedule to the rules sets out the form of the notification of sale under rule 61 and this does provide for the signature by "judge" but in this connection it is to be noted that judge is defined in section 2 of the Civil Procedure Act as meaning "the presiding officer of a civil court" and this would include the deputy registrar when he is acting under the provisions of Order 48 rule 3...It is clear that Order 48 rule 3 confers on the registrar not merely the power to make formal orders of attachment and sale, but also to conduct 'proceedings thereunder', at any rate until some formal objection is taken by motion on notice whereupon all further proceedings are to be before a judge. This must be the position here since the intention of this rule is to allow the registrar to conduct the necessary proceedings, and issue the appropriate directions and orders so as to carry out an execution by way of attachment and sale of property, provided that the proceedings are not contested. Therefore the expression "formal orders for attachment and sale of property" include not only the actual orders for the attachment and sale but any other consequential orders, which are necessary to effect this purpose, and this includes an order made under rule 61."

28. In my view the expression Rule 13(4) of Order 22 as read with Order 49 rule 5 of the Civil Procedure Rules must empower the registrar to consider the proceedings before him and then in his discretion himself make an order. Since the registrar acts as a court in these proceedings he should judicially consider the application by either allowing it or rejecting it. He should then make a formal order authorising the execution. This was a very serious omission on the part of the registrar since it was his duty to consider and give directions as to how the execution is to be carried out. He would conclude by making a formal order before issuing warrant of attachment to the bailiff/auctioneer. The Registrar has supervisory powers over the court bailiffs/auctioneers and has to oversee execution proceedings since he is the one who issues the orders and directions. Section 48 of the ***Interpretation and General Provisions Act*** Cap 2 Laws of Kenya provides that where any Act or Decree confers on any person to do or enforce the doing of any act or thing all such powers shall be understood to be also given as reasonably necessary to enable the person to do or enforce the doing of the act or thing. Accordingly, the registrar has to act reasonably in ensuring that the directions he has given are carried out, if they are flouted, he can legitimately intervene except where the execution proceedings are themselves challenged and when this happens, the matter goes to the judge. See also **Famous Cycle Agency & Others vs. Mansukhulala Rariji Karia & Another Kampala HCCS No. 88 of 1992.**

29. Accordingly the execution process which was commenced against both respondents in this matter is set aside and the warrants of execution issued are hereby recalled.

30. The respondents sought an order for compensation for unwarranted embarrassment caused by unlawful attachment. That remedy is incapable of being granted in these proceedings as these proceedings are essentially judicial review proceedings and such remedy is not contemplated under sections 8 and 9 of the ***Law Reform Act***.

31. I award the costs of the application dated 21st October 2010 to the respondents.

Dated at Nairobi this 13th day of November 2013

G V ODUNGA

JUDGE

Delivered in the presence of Miss Makobu for the applicant