Kings Investment Management Co Ltd v Rivatex East Africa Limited (Civil Case 17 of 2020) [2024] KEHC 1203 (KLR) (14 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1203 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE 17 OF 2020

RN NYAKUNDI, J

FEBRUARY 14, 2024

BETWEEN

KINGS INVESTMENT MANAGEMENT CO LTD ..... PLAINTIFF

AND

RIVATEX EAST AFRICA LIMITED ..... DEFENDANT

RULING

1. This ruling arises from the application dated 25th July 2023 where the applicant sought the following orders;

    1. Spent

    2. That a Notice to Show Cause does issue compelling. Prof. Thomas Kurgat, the Managing Director/ Accounting Officer of the Defendant Respondent, to appear in court to show cause why he should not be cited for contempt for disobeying fee orders of this Honourable Court given through fee Judgement dated 17.05.2023.

    3. That Prof. Thomas Kurgat, the Managing Director/ Accounting Officer of the Defendant/ Respondent be committed to civil jail for a period not exceeding 6 months for disobeying fee ciders of this Honourable Court given through fee Judgement dated 17.05.2023 and orders of sequestration of the contemnor's' properties be issued as deemed appropriate by this Honourable Court.

    4. The defendant/respondent pays the costs of this application.

2. The application was supported by an affidavit sworn by Lucy Zhang, the managing director of the applicant where she deponed that this court delivered the Judgment in this matter on the 17.05.2023 in favour of the Applicant/Plaintiff whereas Order C of the said Judgment was an Order for specific performance compelling the Defendant to provide an irrevocable letter of credit to the Plaintiffs bank

as provided in Clause 6 of the Contract. The court granted an Interim Stay of Thirty (30) days and upon the expiry of the period our advocate served the Defendant's Advocates and the Defendant with a Notice to comply with the Court's Order and the Judgment. She stated that the Respondent/ Defendant has failed, neglected and or declined to comply with the Orders in the Judgement of this Honourable Court delivered on 17th May, 2023 and although being knowledgeable of the said Judgement and having been served with a Notice to Comply with the Judgment has failed, neglected and or declined to comply with the Order and the Judgment.

3. She stated that the Defendant is contempt of the Court and is in flagrant contempt of the Court Order and Judgment and therefore the Managing Director/Accounting Officer of the Defendant should be held in contempt of Court. Further, that the Managing Director/Accounting Officer of the Defendant -Prof. Thomas Kurgat should be issued with a Notice to Show Cause to appear in court to show cause why he has failed, neglected and or declined to comply with the Order and Judgment of the Honourable Court delivered on 17/05/2023.

4. The court issued orders on 17th October 2023 tow it a Notice to Show Cause was issued to the Managing Director of the respondent as to why he should not be cited for contempt for disobeying the orders dated 17th May 2023, being a judgement rendered by this court. The court ordered that he be committed to civil jail and also granted the him leave to respond to the Notice to Show Cause.

5. The director of the applicant. Dr. Prof. Thomas Kurgat, hereinafter referred to as the respondent, filed a replying affidavit dated 1st November 2023. He stated that he cannot be personally held liable for failure to issue a letter of credit in the following circumstances;

    1. The Defendant is in breach of pre-requisites for issuance of a letter of credit.

    2. He is bound by advice of his staff on the propriety and viability of issuing a letter of credit. In this case, advise from his Legal and Finance Departments.

    3. Where the public body/Defendant that he is managing has not been adequately funded by government, and on the inverse, has actually recalled funds making it impossible to underwrite the letter of credit in issue, and to sustain contract.

    4. He is not the sole signatory of the Defendant's bank accounts and instruments of funding. In so far as other departments are not comfortable to sign, in this case especially Finance and legal, he cannot cause a letter of credit to issue.

    5. It will not be fair and just to punish him personally, solely because he is the person in charge of a public body, whilst he has not deliberately refused to issue a letter of credit. The failure being on account of obligations placed on him by the need for finances to issue it, issuing it with advice aligned to its issuance, and exercise of good faith and bona-fide conscience in the management of public body and public funds.

6. He urged that he is familiar with the facts concerning the contract between the plaintiff and the Defendant which arose from the award of tender No. REAL/38/2019-2020 for the supply and delivery of Virgin Polyester & viscose staple Fibre. The Plaintiff was a bidder who submitted its bid following advertisement of tender No. REAL/38/2019-2020 and became the successful tenderer. They executed a contract dated 4th February, 2020 witnessed by the Finance & Administration Manager on the part of the Defendant and Lucy Zhang executed the same in the capacity of Managing Director

7. The contemnor urged that he had taken advice and checked on the status from his staff including the Legal and the Finance departments and swore the affidavit incorporating the advice availed to him and in a nutshell, they advised him against signing the letter of credit.

8. The contemnor proceeded to explain himself as follows;

> That under Articles 201, 206, and 227(1) of *the Constitution*, Sections 196,197,198, and 202 of the *Public Finance Management Act* (PFMA), *Anti-corruption and Economic Crimes Act* [ACEC] 2003,Sections 46,47,50 and 58, *Companies Act* 2015, Sections 142,143,144, and 145, and Public Procurement and Disposal Act [PPDA] Sections 53,54, 55, 93,95 and 98 he is unable to provide the letter of credit for various reasons including that the Plaintiff has failed to supply Rivatex, the Defendant with the various pre-requisites to qualify for issuance of any letter of credit.

9. He urged that the Defendant is a 100% public entity governed by especially P.F.M.A. That it receives government support through budgetary, allocations and has not received funding it was hoping to get. If it were to proceed to issue the letter of credit and proceed with the contract with the high costs of production, it will ultimately have a ripple effect on its overall operations, bringing it to a halt. Further, he averred that the Government recalled funds that the Defendant would otherwise use to facilitate the letter of credit and to see through the contract. He proceeded to restate the issues raised in the main suit with regards as to why they failed to meet their end of the contract.

Applicants' Submissions

10. Learned counsel for the applicant filed submissions on 9th November 2023. He deponed that the doctrine of functus officio was stated by the Court of Appeal in Telcom Kenya Ltd -vs- John Oehanda (suing on his behalf and on behalf of 996 former Employees of Telcom Kenya Ltd. (2014) eKLR. Further, that the doctrine does not bar a court from entertaining a case it has already decided but is so barred from revisiting the matter in a merit-based re-engagement with the case once final judgment has been entered and a decree issued, meaning procedural interlocutory applications only. He urged that it is plain and clear that this court having pronounced the final judgment is being asked to re-engage itself and to interrogate on the very issues that had been raised in the defence. This is against the law and laid down principles of functus officio.

11. The Contract signed by the parties and dated 04.02.2020 was signed by Prof. Thomas Kipkurgat the Managing Director/Accounting officer and Titus Kipkemboi the then Finance and Administration Manager. The Public Procurement and disposal Act under Section 44 designates the Accounting Officer of every public institution as the officer responsible for all procurement processes and thus Prof. Thomas Kipkurgat being tile Accounting Officer and having signed the Contract is responsible to open the Letter of Credit on behalf of the Defendant which has blatantly failed and or neglected the Court Order on specific performance and providing of the Letter of credit. The applicant provided documents in the Supporting Affidavit of Lucy Zhang in previous business engagements and urged that the Defendant is estopped from alluding to the inexistence of the Plaintiff. The Plaintiff having entered into the contract incurred huge costs of USD 644, 038.00 and continues to incur growing storage costs as pleaded for the production to meet its contractual obligations and that is the reason why the Court ordered for specific performance.

12. On the issue of lack of funds, counsel pointed out that the Defendant immediately after cancelling the contract in March 2020 went ahead to re-advertise the tender again on 26.05.2020; it had re-advertised quoting the same quantity and products and also again in November, 2021 the Defendant advertised another tender for the same products. Therefore, the Defendant cannot claim that funds were recalled and has had financial challenges.

13. The Public Procurement and Disposal Act under Section 44 (2) (a) mandates upon the accounting officer of any public entity to ensure that procurements of goods, works and services of the public

entity are within approved budget of that entity and further under Section 53 on Procurement and asset disposal planning, sub-rule (2) provides that an ac¬ counting officer shall prepare an annual procurement plan which is realistic in a format set out in the Regulations within the approved budget prior to commencement of each financial year as part of the annual budget preparation process and further sub-rule (9) stipulates that an accounting officer who knowingly commences any procurement process without ascertaining whether the good, work or service is budgeted for, commits an offence under the Act. If at all there are no funds, under the provisions of the Act the Accounting Officer has violated the Act for issuing the tender, entering into the contract with the Plaintiff and even initiating the draft irrevocable Letters of Credit through its bank. The Court has to protect the innocent party-the Plaintiff not to suffer due to the ineptness of the public officers of the Defendant. Further, the Defendant cannot be heard at this point to state that it is a public institution and performing its obligations under a contract it voluntary entered poses risk to public resources.

14. Counsel urged that the defendant cannot hide in the provisions of *the Constitution* and the other statutes. He cited Civil Appeal No. E398 of 2021 Centurion Engineering & Builders Ltd vs- Kenya Bureau of Standards where the Court held that a public body is estopped from invoking statutory provisions that were never incorporated at the contracting stage to avoid liability to fulfil its contractual obligations. The Court noted that the Respondent "being a public body ought to have governed itself as such and not at the last-minute try and turn tables"

15. The Order of the Court is for specific performance of the Contract on the part of the Defendant. This would entail opening of the Irrevocable Letter of Credit. Irrevocable Letter of Credit is the practice for International Trade and contracts and does not pose any risk for loss of money. In L.C payment, the seller can only access money once it produces and ships as per the L.C terms. The Buyer's bank can only release money to the seller's bank once it has received and authenticated all shipment documents as per the L.C terms. No risk at all is posed to the Defendant and the insinuation that this will risk Defendant and or public resources is baseless.

16. The Defendant and particularly of Prof. Thomas Kipkurgat is in contempt of court. Counsel cited the case of Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi eKLR where the Court held that;

> "In view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect."

17. He also cited the case of Republic v County Chief Officer, Finance & Economic Planning, Nairobi City County Ex Parte Stanley Muturi eKLR and the case of Teacher's Service Commission vs. Kenya National Union of Teachers & 2 Others Petition No. 23 of 2013 in support of submissions.

18. Counsel maintained that the Defendant and particularly Prof. Thomas Kipkurgat the Managing Director/Accounting officer was aware of the Judgment and the Orders of the Court even after he had been served with the Notice to Comply with the Judgement and Orders but neglected the Orders of the court and he is thus in contempt of Court. Counsel urged the Court to hold the Defendant and particularly Prof. Thomas Kipkurgat the Managing Director/Accounting officer in Contempt of Court and commit him to civil Jail. Counsel also sought costs of the application.

Respondent's submissions

19. Learned counsel for the respondent filed submissions on 16th November 2023 where he regurgitated the contents of the supporting affidavit verbatim. It is the Defendant's cause that the Defendant is in

breach of pre-requisites for issuance of a letter of credit. Counsel urged that the Managing Director is bound by advice of his staff on the propriety and viability of issuing a letter of credit. He reiterated that the advice from his Legal and Finance Departments. The two (2) advise against the issuance of the letters of credit because of (i) breach of contract (ii) lack of funds. He repeated the contents of the supporting affidavit.

20. Counsel urged that the court were able to insist on specific performance then it would amount to re-writing contract between parties tendering. The Defendant rely on the case laws that maintain that Courts do not rewrite contracts between parties.

21. The Defendant prays that the court finds that on its account it be found that the Managing Director [M.D.] has shown adequate cause why it cannot be party to issuance of letter of credit on account of:-Breach of contract by Defendant, culpable unlawfulness, or illegality or impropriety. The personal liability that he would be personally and solely responsible for.

22. Counsel urged that one of the main questions that obtain in the notice to show cause is whether the Managing Director (M.D.) should proceed with processing of the letter of credit even when there is unlawfulness and illegality and or improper ties in the process culminating in the award.

23. It is the contemnors' case that *the Constitution* of Kenya 2010 Article 226 (5) makes him personally liable for any impropriety on such expenditure. Both while in office and even after he leaves offices. The Article 226 (5) of *the Constitution* of Kenya 2010 and the resultant statutes make the Managing Director [M.D.] solely responsible situation he does not share with any other party, nor can call any other parties in mitigation including the procurement. He also remains bound personally under Articles 201,206, and 227(1) of *the Constitution*, Sections 196,197,198,199 and 202 of the *Public Finance Management Act* (PFMA), *Anti-corruption and Economic Crimes Act* [ACEC] 2003, Sections 46, 47, 50 and 58* *Companies Act* 2015, Sections 142, 143, 144, and 145, and Public Procurement and Disposal Act [PPDA] Sections 53, 54, 55, 93, 95 and 98. These provisions of law. Counsel reiterated the contents of the affidavit and urged the court to find that he should not be punished on the Notice to show cause.

Analysis & Determination

24. The predominant principles upon which the plaintiff/applicant has laid a constant theme to ensure execution and enforcement of the decree as a matter of emphasis is in line with the dicta in the comparative case of RTS Flexible Systems Vs Molkerei Alois Muller GmbH & Co. KG (2010) UKSC in which the court held as follows;

> " The general principles are not in doubt. Whether there is a binding contract between the parties and, if so upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intend to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement."

25. It is trite contractual freedom means freedom of choice for the parties. First, the parties must be free to choose the other party as a partner in concluding the contract. Like the tango dance, the contract can only be performed when there are two parties and both parties, in theory, must have chosen each

other by consensus. Second, the parties must be free to choose the terms of the contract they will enter into. The contract involves the exchange of competing interests, but this exchange must be consensual. However, for now there is only one issue for determination before this court;

> Whether the respondent has shown cause as to why he should not be held in contempt of court

26. The present application before this court is a very simple one, requiring the respondent to show cause as to why he should not be held in contempt of court. The respondent in question is Dr. Professor Thomas Kipkurgat, who has repeatedly stated in his responses that he relies on advice from his legal team and advisors as to why he chose not to comply with court orders which have never been appealed against and are still in force to this date. The responses to the application and the submissions leave a lot to be desired, to say the least. Whereas he seeks to constantly lay the blame on following the advice of, to name a few, his legal staff and his finance department staff, the respondent has terribly failed to explain to the court why he should not be held in contempt.

27. The responses to the application, including submissions by the firm of Katwa and Kemboy advocates are an attempt to litigate the decision of the court that was already delivered. One cannot distinguish the submissions from the replying affidavit as the contents are replicated almost to the tee. It is an insult to the court and an abuse of the court process for counsel to restate the case to the court, including submissions that were made in court and reproduction of evidence that the court deliberated upon. In an application to show cause the respondent has chosen to address whether the court was justified in ordering for specific performance, an issue that it has already settled, indicative of the fact that the respondent has misconstrued this as a forum for appealing the decision.

28. It is evident that the respondent has no intention of complying with court orders and the lengthy responses which barely address the issue of contempt are intended to delay the applicant from enjoying the fruits of judgement. The court shall not be invited to delve into issues it had already determined in its judgement as it cannot sit on appeal on its own decision, a position that is a basic tenet of law. The issues raised by the respondent in response to the application are grounds for an appeal and cannot serve the purpose of purging the contempt.

29. The respondent has attempted to absolve himself from any liability on the basis that he has essentially been advised not to comply with court orders. He has not disputed that he is the Managing Director/ Accounting Officer of the Respondent company which would have been an avenue to absolve himself of any responsibility.

30. As stated by the Constitutional court of South Africa in Pheko Vs Ekurhuleni City (2015) the court held;

> " The rule of law, a foundational value of *the Constitution*, requires that the dignity and authority of the courts be upheld. This is crucial, as the capacity of the courts to carry out their functions depend upon it. As *the Constitution* commands, orders and decisions issued by a court bind all persons to whom and organs of stated to which they apply, and no person or organ of state may interfere, in any manner, with the functioning of the courts. It follows from this hat disobedience towards court orders or decisions risks rendering our courts impotent and judicial authority a mere mockery.

31. It is only natural that by virtue of the oath of office judges prefer to hear and decide cases in an hygiene atmosphere free from any interference, intimidation, harassment or prejudice. It is the authority of the court which sustains the rule of law as one of the national values and principles of governance

in Art.10 of *the Constitution*. No judge enjoys making a decision or passing judgement to which the National Government, County Government, Public Body or entity is hostile or antagonistic in response to the outcome. It is of extreme need for the interest of justice to thrive, that no litigant or conduct of any nature should be permitted which is likely to impair the court in the delivery of justice within the prescription of fair trial rights. One of the most disturbing aspect of this case is the probability that International investors like the applicant will lose confidence in our legal system by taking a position that the same is fundamentally dysfunctional when it comes to enforcement of judgements. I would hold that a general rule where the only matter to be considered is on enforcement of the fruits of the judgement it is only fair and temperate criticism be legitimate and if anything any aggrieved party do invoke the jurisdiction of other superior courts to test the jurisprudence. There can be no doubt that disobedience of court orders at any levels of government or by private citizens is to that extent promotions of anarchy. In this case I entertain also no doubt that with proper legal advice the respondent could not have been cited for contempt. The authority and reputation of our courts in recent times is so frail that their judgment need to be shielded from just outright criticism and disobedience.

32. In the final analysis it the people of Kenya under Art.1(1) of *the Constitution* who must believe in the integrity of the Judiciary as a creature of *the Constitution* in Art.159 and its Judges of various levels in our legal system. It should be known to all citizens of this Republic that without trust and confidence building the judiciary cannot function within the dictates of *the Constitution* and owe unto them if the judiciary fails to function properly the rule of law dies. On the face of it that is how such disobedience of court orders is likely to ensue anarchy or chaos.

33. The respondent being the managing director/accounting officer of the respondent company, bears the burden of ensuring the court order is complied to. I am at pains to understand why his numerous advisers did not present him with the option of appealing the decision as it is evident from the contents of their submissions and affidavit that they dispute the entire judgement.

34. The practice of treating court judgements as mere suggestions is an affront to justice and cannot be allowed to potentially fester into the cancer that would result in a sense of lawlessness. In Econet Wireless Kenya Ltd vs. Minister for Information & Communication of Kenya & Another [2005] 1 KLR 828, Ibrahim, J (as he then was) stated:

> "It is essential for the maintenance of the rule of law and order that the authority and the dignity of our Courts are upheld at all times. The Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors. It is the plain and unqualified obligation of every person against, or in respect of whom, an order is made by a Court of competent jurisdiction, to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or void".

35. Additionally, in the case of Attorney General v Harris (1961) 1 QB 74 Sellers LJ decried differential treatment in form of fines and observed that; "it cannot, in my opinion, be anything other than public detriment for the law to be defied, week by week, and the offender to find it profitable to pay the fine and continue to flout the law. The matter becomes more favourable when it is shown that by so defying the law the offender is reaping an advantage over his competitors who are complying with it."

36. The failure by an Accounting Officer to comply with a court order amounts to contempt of court as was held in the case of Republic -vs- County Chief Officer, Finance & Economic Planning, Nairobi City County Ex parte Stanley Muturi (2018) eKLR where the court held as follows;

> " In my view the failure by the accounting officer of a State organ, government department, ministry or corporation to put into motion steps 5 necessary for the settlement of or obedience of court decisions or facilitation of such settlement is prima facie evidence of neglect."

37. Court orders are not issued in vain and the contemnors efforts to relitigate the issues that the court had already determined cannot purge the contempt. It is trite law that court orders are not issued in vain, they must be obeyed. If the alleged contemnor takes issue with the legality of the judgement, the correct avenue is by way of an appeal and not a blatant disregard for court orders to the extent of not appearing before the court in person to show cause and purge his contempt.

38. It is however evident from both oral and written submissions of the parties in the present case and it is a matter of public knowledge that the respondent is a public enterprise being funded in its operations by the taxpayer's money. Although the respondent in this instance avowedly seeks by an act of avoidance not to settle the decree, there is even a question respecting the interpretation of Section 21 of the *Government Proceedings Act* as read with Section 29 of the Civil Procedure Rules. What is the statutory framework?

> " 1. 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 and order of costs) is made by any court in favour of any person against the Government as such, the proper office 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 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 prescribed form containing particular of the order;
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> 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.
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> 2. A copy of any certificate issued under this section may be serve by the person in whose favour the order is made upon to be paid to the applicant.
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> 3. 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, lawful due thereon.
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> 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.

4. Save a foresaid, no execution or attachment or process in the nature thereof shall be issued out of any such court for enforcing payment by the Government of any such money or costs as a foresaid, and no person shall be individually liable under any order for payment by the Government, or any Government department, or any office of the Government as such, of any money or costs."

39. In addition, the issues promulgated in the above provisions were also directly and substantially dealt with by the Court of Appeal in Kisya Investment Ltd Vs AG (2005) KLR74. This in determining whether the Respondent Managing Director should be admitted into this proceeding as an accounting officer to be subjected to civil jail for failure to honour the decree of this court.

> "Order 28 rules 2(1) (a), (2) and (4) of the Civil Procedure Rule 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 or any written law cannot amount to the 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 authorized by statute, and any unauthorized payment may be recovered SEE HAILSBURY'S LAWS OF ENGLAND 4TH EDN VOL 11 PARA 970AND 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 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 Aucklan Harbour Board Vs. R (1924) AC 318,326. The second situation, which arises from the above, is that once a decree or judgement is obtained against the Government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Comptroller and Auditor General etc. for scrutiny and approvals for it to be paid from the Consolidated Fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the Government structure, procedures, red tape and large number of claims, this could take a long time. If execution and/or attachment against the Government were allowed, there is no doubt that the Government will not be able to pay immediately upon passing of decrees and judgements and will be inundated with executions and attachments of its assets day in, day out. Its buildings will be attached and its plant and equipment will be attached, its furniture

and office equipment will be attached, its vehicles, aircraft, ship and boats will be attached. The Government and therefore the state operations will ground to a halt and paralysed and soon the Government will not only be bankrupt but, its 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.

40. It has long been held that is the accounting officer of a State organ, government department, ministry or corporation that is legally bound to satisfy a decree, In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543 the Court expressed itself, 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...
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> ... 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."

41. The law on this subject is and must be founded entirely on public policy. It is not there to protect the rights of parties to a litigation but to prevent avalanche of execution and enforcement of decrees against the Government, Public Body or State Agency. It should in my judgment be limited to what is reasonably necessary for that purpose. On the facts of the case the jurisdiction, procedure and powers of the courts in respect of execution against the respondent may not have been legitimately invoked by the applicant. It is therefore the courts contention that there is an alternative procedure by way of writ of mandamus and further by a more suitable procedure under the *Government Proceedings Act*. In this class of case I have taken the view that it could have been appropriate before citing the managing director for contempt to effect an order for Civil Jail it be established that there was compliance with the doctrine of exhaustion. The main thrust is that the respondent as a body established by law to exercise either generally or specifically or subject to defined laws the contempt proceedings had not ripened against the Managing Director. Indeed, that is moot.

42. On the other hand, the court takes into account the fact that the respondent company is owned by Moi University which is a public university. It follows that the same is considered "government" and therefore the compliance with court orders is not in the same manner as would be with a private company. There is a laid-out procedure in the *Government Proceedings Act* when executing a court order against government. This procedure is due to the nature of the issue of funding and budgets allocation is an issue the respondent has raised severally in his response. Keeping this in mind, the court acknowledges that the respondent is in between a rock and a hard place in terms of compliance with the orders. At this juncture he benefits from the fact that the respondent is a government owned entity and therefore the shield provided by the *Government Proceedings Act* applies mutatis mutandis to these proceedings. As such, he cannot be personally held responsible for the failure of the respondent to comply with the court orders at this stage.

43. The approach which allows orders for committal for contempt of court to punish the Managing Director in a broader sense of the remedy sought by the applicant fails. Being a punitive measure is a sanction of last resort. As a consequence, the facts so established shows that the applicant bears an evidential burden in relation to compliance of the provisions of the *Government Proceedings Act*. The applicant would therefore escape censure on a punitive scale as urged in his application. For those reasons such an order made primarily to ensure the effectiveness of the original judgment be and is hereby dismissed with costs to be borne by the applicant.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 14TH DAY OF FEBRUARY 2024

In the presence of:

Mr. Kavita Advocate for the Applicant

M/S Waweru for Katwa Advocate for the Respondent

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R. NYAKUNDI

JUDGE

Coram: Before Justice R. Nyakundi

Mr. Kavita Advocate for the Applicant

Mr. Katwa Advocate for the Respondent