



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT SIIAYA

MISCELLANEOUS CIVIL APPLICATION [JUDICIAL REVIEW] NO. 32 OF 2020

IN THE MATTER OF: ORDER 53 OF THE CIVIL PROCEDURE RULES

IN THE MATTER OF: AN APPLICATION BY DESH GENERAL TRADERS LTD: FOR JUDICIAL REVIEW ORDERS OF MANDAMUS AND FOR LEAVE TO APPLY FOR THE SAME

IN THE MATTER OF: A JUDGMENT DELIVERED ON 24TH JULY 2008 IN FAVOUR OF THE APPLICANT IN SIIAYA PMCC NO. 16 OF 2004 AS AGAINST THE PREDECESSOR OF THE RESPONDENTS HEREIN BEING UGUNJA TOWN COUNCIL

IN THE MATTER OF: SECTION 34 AND 134(1) OF THE COUNTY GOVERNMENT ACT NO. 17 OF 2012

IN THE MATTER OF: SECTION 15 AND 33 OF THE 6TH SCHEDULE OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF: THE TRANSITION TO DEVOLVED GOVERNMENT ACT NO. 1 OF 2012

IN THE MATTER OF: THE COUNTY GOVERNMENTS PUBLIC FINANCE MANAGEMENT TRANSITION ACT

IN THE MATTER OF: SECTION 23 (3) (e) OF THE INTERPRETATION AND GENERAL PROVISIONS ACT, CAP 2 LAWS OF KENYA

BETWEEN

REPUBLIC..... APPLICANT

VERSUS

1. COUNTY SECRETARY, THE COUNTY GOVERNMENT OF SIIAYA

2. COUNTY GOVERNMENT OF SIIAYA.....RESPONDENTS

AND

DESH GENERAL TRADERS LTD.....EXPARTE APPLICANT

JUDGMENT

1. The *exparte* applicant herein **DESH GENERAL TRADERS LTD** brings this Judicial Review Application by way of Notice of Motion dated 26th May, 2020 under Order 53 Rule 3(1) of the Civil Procedure Rules and all the enabling provisions of the law. The Notice of Motion was filed pursuant to leave of court granted on the 22nd May 2020. The Notice of Motion seeks the following orders:

a) THAT the honourable court be pleased to grant an order of Mandamus compelling the respondents jointly and severally to pay the applicant the decretal sum, interest and costs awarded on the 24th July 2008 in SIIAYA PMCC NO. 16 of 2004 all totaling Kshs.1,201,147 as at 24th June 2020 and which will thereafter continue to attract monthly interest of Kshs.4,456/=.

b) THAT all the consequential directions as may be deemed necessary be given.

c) THAT the costs of this application and by extension the costs of the entire proceedings in this suit and for the grant of leave be paid by the respondents.

2. The Notice of Motion is predicated on the grounds:

a) THAT the applicant filed a suit on **8th October 2004** in Siaya Principal Magistrate's Court Civil Suit No. **16 OF 2004** for damages against Ugunja Town Council and 2 others and the said suit was heard and finally determined on **24th July 2008** vide judgement delivered in favour of the applicant in the sum of **Kshs. 445,600/=**, costs and interest, currently totaling **Kshs.1, 201,147** as at **24th June 2020** and which will thereafter continue to attract monthly interest of **kshs.4,456/=** till payment in full.

b) THAT despite repeated demands, notices and requests by the applicant to the then Ugunja Town Council and to the respondents herein to pay the decretal sum awarded thereof, costs and interest, the respondents have deliberately ignored and/or refused to pay the said judgement amount in **SIAYA PMCC NO. 16 of 2004**.

c) THAT enforcement of the judgement/decreed made thereof in **SIAYA PMCC NO. 16 OF 2004** against the respondents herein who took over the liabilities of Ugunja Town Council as provided for within several statutes and the Kenya Constitution 2010 that created the 2nd respondent can only be by way of the grant of an order of mandamus under the provisions of order 53 of the Civil Procedures Rules compelling the respondents to pay the applicant.

3. The application is further supported by the Statutory Statement and Verifying affidavit sworn by **LUCAS OSORE MAGOHA** on 19th May 2020 and filed on 22nd May 2020 in support of the application for leave to bring this application. The annexures are the decree and Certificate of Costs in Siaya PM CC NO. 16 OF 2004 dated 8th June 2010, Notice of Judgment dated 6th July 2010, application for execution of decree and copy of Notice to show cause dated 5th September 2011.

4. In the Verifying Affidavit, the exparte applicant's General Manager deposes that he was the General Manager of the applicant's businesses and that on 8th October 2004 the exparte applicant filed suit against Ugunja Town Council 7 2 others vide **SIAYA PMCC NO. 16 of 2004** seeking for damages claiming that the said defendants had unlawfully and illegally crippled its business by taking away furniture and tools of trade at Savana Grassland Hotel, Ugunja, St. Michael Hotel, Ugunja and Ugunja Guest House; That judgment was delivered in favour of the exparte applicant herein on 24th July 2008 wherein the court awarded the exparte applicant then plaintiff damages in the sum of **Kshs. 445,600/=**, costs of **Kshs.118,339/=** together with interest all now totaling **Kshs.1,205,603/=** or thereabout as at 24th July 2020 which shall continue to attract monthly interest of **Kshs.4,456/=** thereafter till payment in full.

5. The exparte applicant claims that *despite demand, notices and request to the defunct Ugunja Town Council and to the respondents herein to pay up the decretal sum, interest and costs as awarded, the respondents have neglected and/or refused to pay up for close to twelve (12) years.*

6. It was further deposed that the defunct Ugunja Town Council having been a local authority and the 2nd Respondent and its officers being the successive County Government, it has been difficult to execute against the then Ugunja Town Council and even the present Respondents in all manner of ways whatsoever hence these Judicial Review proceedings for Mandamus.

7. Opposing the Notice of Motion, the Respondents jointly filed a replying affidavit sworn by **Joseph Ogutu**, the County Secretary of Siaya County – the 2nd respondent herein.

8. It was deposed by Mr. Ogutu that during the transition period, the Transition Authority of Kenya as it was known then was established under the Transition to Devolved Governments Act and charged with the responsibility of preparing and validating an inventory of all existing assets and liabilities of government, other public and local authorities and provide a mechanism of securing their assets and liabilities.

9. Further deposition was that the Transition Authority in exercise of their mandate to verify the liabilities of defunct local authorities placed a notice in the Daily Nation Newspaper of 1st December, 2014 inviting members of public who had unsettled claims against the defunct local authorities to submit the same with supporting documents to the Authority for purposes of auditing and verification. However, that the life of the Transition Authority came to an end before it had completed its mandate and that in its place a new entity known as the **Intergovernmental Relations Technical Committee** whose mandate include undertaking the audit and verification of the assets and liabilities with a view to recommending a mechanism for transferring the verified assets and liabilities of the defunct local authorities to county governments for settling.

10. It was further deposed that the **Intergovernmental Relations Technical Committee** through **Gazette Notice No.2701 of 2017(annexed)**, advised members of the public who had any claims arising from the defunct Local Authorities to submit their claims to the Committee at their offices within the county governments.

11. Further, that the said **Intergovernmental Relations Technical Committee** is yet to complete its task and come up with a report which is meant to inform the county government on the manner in which it needs to proceed and, or handle liabilities such as the one which is the subject of this Application.

12. It was further deposed that it is the position of the law that any liability of the defunct local authorities need to be audited and verified before the county government can assume jurisdiction over the same.

13. The Respondents deny bearing any obligation or that the County Government has any obligation in law to commence paying any liabilities that accrued during the term of the defunct local authorities before the same are audited and verified by the body mandated to do so. They urged the Applicant to submit its claim before the said **Intergovernmental Relations Technical Committee** for verification before the same can be transferred to the County Government through the mechanisms provided for under the law.

14. According to the Respondents, the applicant is attempting to seek for Court's order compelling the County Government to settle a liability in a manner that would run contrary to the process defined in law. It is contended that in this case, the County Government of Siaya has only been made aware of **Civil Suit Siaya PMCC No.16 of 2004** and the unsettled decretal sum by the Applicant's Notice of Motion dated 26th May, 2020. In addition, that even if the Applicant had submitted his demand as he purports, which is hereby denied, the County Government would have advised him to submit his claim through the Intergovernmental Relations Technical Committee for verification.

15. It was deposed further that the Applicant is trying to mislead the Honorable court by claiming that it has issued several demand letters to The County Government to settle the decretal sum, as the County Government is yet to receive any such demand from the Applicant and should it have received, then the Applicant would still have been advised to submit the same in the manner mentioned stated hereinabove.

16. The Respondents believe that the Applicant is seeking to unjustly enrich itself by waiting for over Ten (10) years for the interest on the decretal sum to accrue to a substantial amount for them to seek payment of the same; and that the applicant maliciously filed the application with the sole aim of unlawfully enriching itself knowing very well that if it had raised their claim Ten years ago and the same had been settled then, they would not have enjoyed the substantial interest accrued on the decretal sum as being claimed now.

17. It was therefore deposed that the applicant's Application is premature and that the Applicants should allow the **Intergovernmental Transition Committee** to finalize the process of auditing and verification of assets and liabilities arising from the local authority. This court was urged to dismiss the application with costs to the Respondents.

18. In a further affidavit sworn by **LUCAS OSORE MAGOHA**, in response to the replying affidavit sworn on 15th June 2020 by the 1st respondent office holder, it was deposed on behalf of the applicant that the constitutional and legal issues raised by the 1st respondent in his replying affidavit at paragraphs 3-12, that the answers to all the legal issues raised therein can be found in the applicant's written submissions dated 8th June 2020 as filed and as supported by two High Court decisions namely **Kisii High Court Misc. Civ. Application No. 3 of 2012 (Dr. J.A.S Kumenda & another versus Clerk Municipal council of Kisii & 6 others)** and **Nairobi High Court Misc. Civil Application No. 448 of 2006 (Ayub Murumba Kakai versus Town Clerk, Webuye County Council)** which decisions, it was asserted, controvert the assertions in the said replying affidavit and sets out the clear position in law as to the Respondents' liability as the successor of Ugunja Town Council, the defendant in **SIAYA PMCC NO. 16 OF 2004** in which judgment was delivered on 24/7/2008.

19. Further, it was deposed that the legal position as submitted by the applicant's advocate in his written submissions as filed and as supported by the two (2) High Court decisions relied on thereto is categorical that the respondents herein are liable and have to satisfy the decretal award in **SIAYA PMCC NO. 16 OF 2004**.

20. It was further deposed that the Respondents were made aware of the decretal sum in **SIAYA PMCC NO. 16 OF 2004** before this suit was *filed as one of the applicant's representatives did engage the respondents severally on the need to satisfy the decretal sum, without success. Further, that the applicant approached the 2nd Respondent's then Chief Officer, Finance, a Mr. Dan Okoth who sought to be furnished with the judgment and decree in the said SIAYA PMCC NO. 16 OF 2004 with a view to settling the same but that despite being supplied with the judgment and decree as requested, he never settled the same.*

21. That the applicant again engaged the 2nd Respondent's new Chief Officer, Finance, **Mr. Dennis Nyonje** but that he has also just made promises which have been in vain, therefore prompting the applicant to file this suit as the limitation period for execution of the same was almost lapsing.

22. On the contention by the Respondents that the applicant waited for over ten (10) years for interest to accrue without seeking payment, it was deposed that this is not understandable because the 1st Respondent has clearly stated in his replying affidavit that he can't pay the said claim due to the legal technicalities raised in his said replying affidavit, which shows why the claim has remained unsatisfied to date despite the applicant's several attempts to have the same settled through the 2nd Respondent's Chief Officer, Finance.

23. It was further deposed that there is clear evidence as per the annexures at pages 1 to 3 in the verifying affidavit filed in support of the statement of facts confirming that the applicant issued notices to Ugunja Town Council and even filed a notice to show cause in execution of the decretal sum thereof but no payment was made hence, the allegation by the Respondents that the applicant bought time for interest to accrue is farfetched.

SUBMISSIONS

24. The parties canvassed the Notice of Motion via written submissions. In the submissions filed by the exparte applicant's counsel, the contents of the Notice of motion, statutory statement, verifying affidavit and further affidavits were reiterated.

25. In addition, the applicant's counsel sought via the submissions to amend the prayers urging the court to find that the decretal sum attracted **14%** interest per annum as stipulated in the decree in **SIAYA PMCC NO. 16 OF 2004** and not **12%** as prayed for in prayer No.1 of the Notice of Motion. It was also submitted that consequently, the principal sum of **Kshs.445,600/=** together with interest at 14% per annum as at 24th June 2020 and costs should total **Kshs.1,307,552.60** and not **Kshs.1,201,147/=** as reflected in the notice of motion application. That 14% interest per annum totals **Kshs.62, 384/=** and per month totals **Kshs.5, 199/=** and not **Kshs.4, 456/=** as indicated therein, to be multiplied by 11 years and 11 months from the judgment date of 24th July 2008 till 24th June 2020 thus 11 years totals **Kshs.686, 224/=** while the additional 11 months at **Kshs.5, 199/=** per month totals **Kshs.57, 189/=**. Add to costs assessed at **Kshs.118, 529.60** totals **Kshs.1, 307,552.60**.

26. The applicant's counsel further sought to amend prayer 1 of the notice of motion application to reflect the monthly interest applicable after the 24th June 2020 to be **Kshs.5,199/=** per month till payment in full.

27. Counsel for the applicant reiterated that the applicant sought to enforce decree against the Ugunja Town Council by taking out Notice to show cause proceedings which proceedings never yielded much as section 263A of the Local Government Act as then existing outlawed attachment of a local authority hence the invocation of the provisions of Order 53 of the Civil Procedure Rules by seeking an order for mandamus that would compel the local authority and/or the respondents to pay.

28. It was submitted that subsequent demands by the applicant to the respondents to pay the decretal sum had since fallen on deaf ears therefore necessitating the filing of the present suit before the lapse of the 12 year limitation period for execution of the judgment. Reliance was placed on KISII ELC COURT MISCELLANEOUS CIVIL APPLICATION NO. 3 OF 2013-DR. J.A.S KUMENDA & ANOTHER VS THE CLERK MUNICIPAL COUNCIL OF KISII & 6 OTHERS in a Ruling delivered by Justice S. Okongo on 14th June 2013 where the court observed:

“As stated above, under the new system of devolved governments, the management of towns, municipalities and cities fall upon County Governments to be administered by boards and committees on their behalf. It follows therefore that until new towns, municipalities and cities are set up under the Urban Areas and Cities Act in the manner stated above the former towns, municipalities and cities would be under the direct management of County Governments. Due to the foregoing, the County Governments are in my view the successors of the local authorities that were constituted under the repealed Local Government Act and should be the ones to proceed with pending legal actions by the defunct local authorities and against whom the pending legal proceedings against the said local authorities should be sustained. I find support in this proposition in the Sixth Schedule to the Constitution of Kenya.”

“Section 33 of the Sixth Schedule to the Constitution of Kenya, 2010 provides that, an office or institution established under the Constitution of Kenya, 2010 is a legal successor of the corresponding office or institution under the former constitution or under a former Act of parliament in force immediately before the effective date of the Constitution of Kenya, 2010 whether known by the same name or a new name. County Governments under the new constitution took over the powers and functions of the local authorities as they were recognized and defined under the old constitution and the Local Government Act. Pursuant to the provisions of the said section 33 of the Sixth Schedule to the Constitution of Kenya, 2010, County Governments are therefore the natural and presumptive legal successors of the defunct local authorities. It follows therefore that until the body referred to in section 59 of Urban Areas and Cities Act is established, legal actions that were pending by and against the defunct local authorities can be sustained or pursued against County Governments under whose jurisdiction such local authorities were situated.”

“In conclusion, it is my finding that this application is sustainable and until the body referred to in section 59 of Urban Areas and Cities Act is set up or established, it shall be sustained against Kisii County Government which will also be bound by any orders that may be issued herein in place of the 1st and 2nd respondents in the application.”

29. It was submitted that the court in the above cited decision re-affirms that county governments are liable to pay for the liabilities of the defunct local authorities and are their successors within their jurisdiction hence Ugunja Town Council’s liabilities were therefore taken over by the county government of Siaya.

30. Further reliance was placed on NAIROBI HIGH COURT J.R. MISC.CIV. APPL. NO. 448 OF 2006- AYUB MURUMBA KAKAI VS TOWN CLERK OF WEBUYE TOWN COUNCIL in a Ruling delivered by justice D.S. Majanja on 31st January 2014 where the learned Judge reiterated the fact that liabilities of local authorities were taken over by the successive county governments within their jurisdiction, and went further to state that enforcement of a decree against a local authority and in this case the county government should be by way of judicial review orders of mandamus. That the court observed thus-

“The applicant was unsuccessful in enforcing the decree against the Town Council prompting the filing an application seeking an order of mandamus.”

“Since the application was filed, the legal landscape concerning the liability of local authorities and their officers under the Local Government Act (Repealed) has changed. The Constitution has introduced devolved government through Counties to replace local authorities. The issue that I need to address is that of liability to satisfy the court order.”

“Despite the statutory lacunae in the County Government Act and the Urban Areas and Cities Act, the rights accrued as a result of the litigation are preserved upon repeal of the Local Government Act by the Constitution. Section 33 of the Sixth Schedule to the Constitution provides for succession of institutions upon promulgation. It states that, “An office or institution established under this Constitution is the legal successor of the corresponding office or institution, established under the former Constitution or by an Act of Parliament in force immediately before the effective date, whether known by the same or a new name.”

“In my view and taking into account the legal provisions I have cited, the County is the legally established body unit contemplated under the law that takes the place of local authorities unless there is a contrary enactment. I therefore find and hold that the proceedings and judgment against Webuye Town Council and its officers must continue against Bungoma County which must now bear the burden of the judgment.”

“The Court cannot grant orders incapable of enforcement as the Town Council and its Town Clerk no longer exist (See Republic Vs Minister for Lands & 2 Others exparte Kimeo Stores Limited [2011] eKLR, Kenya National Examination Council vs. Republic ex-parte Geoffrey Gathenji Njoroge & 9 others CA Civil Appeal No. 266 of 1996). On the other hand, a decree holder’s right to enjoy fruits of his judgment must not be thwarted. When faced with such a scenario, the Court should adopt an interpretation that favours enforcement and as far as possible secures accrued rights. My reasoning is underpinned by the values

of the Constitution particularized under Article 10, the obligation of the court to do justice to the parties and to do so without delay under Article 159(2)(a) and (b) and the applicant's right of access to justice protected under Article 48 of the Constitution."

"In order to give efficacy to the orders of the Court, I hereby make the following Orders;

*i) **THAT**, BUNGOMA COUNTY do give vacant possession of L.R. No. Ndivisi/Muchi 1265 in Webuye Township to the plaintiff on a date to be agreed upon.*

*ii) **THAT**, BUNGOMA COUNTY do pay the applicant sum of Kshs. 100,000/= being general damages together with interest with effect from 1/7/91 until payment in full.*

iii) This Ruling and Order shall be served on Bungoma County for compliance within 30 days from the date of service the order."

31. It was further submitted that despite the directions by this court given on 6th June 2020 that parties attempt an out of court settlement of the matter, the same had not been successful even after service of the respondents with the pleadings herein. Further, that attempts made by the applicant previously before the filing of this suit and after your orders of 2nd June 2020 has not borne any fruit.

32. On the part of the Respondent, it was submitted in contention that the question before this Honourable court is whether the Applicants are entitled for the Judicial Review order of Mandamus against the County Government of Siaya for purposes of settling the decretal sum of KShs.445,000/= and interest accruing of Kshs.1,307,552.60 as it was ordered in the court judgment in Civil case number Siaya PMCC No.16 of 2004.

33. Counsel for the Respondents set out the circumstances under which judicial review order of mandamus are issued as espoused by the Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, where the Court of Appeal cited, with approval, **Halsbury's Law of England, 4th Edn. Vol. 7 p. 111 para 89** and stated in extensor the circumstances under which orders of mandamus would issue.

34. Counsel for the Respondents submitted that orders of mandamus to sought to compel the performance of a public duty which is imposed on a person or a body of persons, and posed the question as to whether the County Government of Siaya has a duty to settle a judgment arising from a matter filed against the defunct local authority, Siaya Municipal council [sic] as was known.

35. It was submitted that Article 176 the Constitution of Kenya establishes a County Government for each county and that the County Government replaced the local authorities that were in existence before promulgation of the 2020 Constitution, and that subject to provision of Section 33 of the Sixth Schedule of the Constitution, the County Governments are the legal succor of assets and liabilities of the defunct local authorities.

36. However, it was submitted in contention that Section 15 of the Sixth Schedule of Constitution mandates Parliament to enact legislation to provide for a frame work for transition to devolved government and how the assets and liabilities from the National government and the defunct local authorities shall be alienated to county governments, thus, Parliament enacted the Transition To Devolved Government Act of 2012.

37. Further submission was that Section 3(d) of the Transition to Devolved Government Act provides, inter alia; that the purpose and object of the act is to provide for policy and operation mechanism during the transition period for audit, verification and transfer to the National and County Government,

(i) assets and liabilities;

(ii) human resources;

(iii) pensions and other staff benefits of employees of the government and local authorities; and

(iv) any other connected matters;

38. In addition, it was submitted on behalf of the Respondents that Section 4 of the Transition to Devolved Government Act established the Transition Authority, and section 7 of the Act mandates the Authority to prepare and validate an inventory of all existing assets and liabilities of government, other public entities and local authorities; to provide mechanisms for the transfer of assets which may include vetting the transfer of assets during the transitional period.

39. The Respondents submit that it is undisputed that the County Government of Siaya is the legal successor of assets and liabilities of the defunct Ugunja Town Council, however they contend that the County Government would have only been in a position settle any liabilities arising from the defunct local authority after the said assets and liabilities had been audited and validated by the Transition Authority. Reliance was placed on the case of **Republic –vs- County Secretary Muranga County Government, Ex parte Thiga Thuita (2014) eKLR** where Ngaa J stated:

"With the emergence of the County Governments, the assets and pre-existing liabilities of the now defunct local authorities was to be shared between those county governments and the national government. The body that was to work out how this

distribution was to be done was the Transition Authority which was created under Section 4 of the Transition to Devolved Government's Act. Among its functions set out in Section 7 of the Act, the Transition Authority is required to prepare an inventory of all existing assets and liabilities of the government, other public entities and local authorities. Once this is done it is upon the Transition Authority to come up with the criteria to determine the transfer of the previously shared assets, liabilities of the government and the local authorities."

40. And a submission made that the County Government is not in a position to pay the amount decreed in Siaya PMCC No. 16 of 2004 until the audit and verification process is completed, bearing in mind the fact that the said judgment was issued before the promulgation of the 2010 Constitution when previous matters of the local authority were conducted under the local Government Act. Counsel cited an obiter finding by Ruth N. Sitati J in the case of **Deros Construction Limited –vs- Secretary County Government of Vihiga (2017) eKLR** where she stated:

"In the context of the matter in controversy in this application, recourse has to be had to the Section 15 of the Sixth Schedule to the Constitution which makes provision for devolution of functions to be made by an Act of Parliament and in particular Section 15(2)(b) thereof which provides that the legislation to be passed by Parliament shall "establish criteria that must be met before particular functions are devolved to County Governments to ensure that those governments are not given functions which they cannot perform."

41. Counsel submitted that it was this provision that gave birth to the Transition to Devolved Governments Act, 2012 and under Section 1 thereof, the Transition Authority was established. The Transition Authority, under Section 7(3) of the Act was charged with the responsibility of preparing and validating an inventory of all the existing assets and liabilities of government, other public entities and local authorities. In particular, the Transition Authority was to **"audit assets and liabilities of local authorities, to establish the assets, debts and liabilities of each local authorityand provide a mechanism that will secure assets and liabilities held by local authorities"**

42. It was further submitted in reiteration that the Transition Authority played a major role in the transfer of assets and liabilities from the defunct local authorities to County government and that once that process was completed then the county government would have been in a position to settle any such liability.

43. In the instant case, it was submitted that the Transition Authority did not complete its tasks as mandated due to lapse of time but there is now in place of the a new body known as **Inter-governmental Relations Technical Committee** established under the Intergovernmental Act of 2012, which is currently undertaking the audit and the verification of the assets and liabilities of the defunct local authorities with the view to enable county governments to meet their legal obligation under a new statutory order.

44. The Respondent's counsel urged that the exparte applicant needs to be patient and allow for the **Inter-Governmental Transition Committee** to finish auditing, and verification of the assets and liabilities arising from the local authority and the same forwarded to the county government which shall come up with a budget allocation for the same and forward to the County Assembly for approval.

45. Further submission was that the Transition Authority through an advertisement on the Daily Nation of 1st December, 2014 invited members of the public who had any pending claims against the defunct local authority to submit their claims with supporting evidence for purposes of auditing and verification by the authority and the same was to be captured in a report to be forwarded to respective County Governments. It was contended that the exparte applicant had not adduced any evidence showing that they reported their claim with the Transition Authority. That despite allegations that they made several request to the County Government of Siaya requesting it to settle the decretal amount and the County has failed to do so, the applicant has not produced any copy of a demand letter addressed to the county government in support of their allegation, nor have they attached a copy of a Certificate as provided in Section 21 of the Government Proceedings Act in support of their Application.

46. It was submitted that this is a case of a party who had slumbered on their rights to enforce a judgment in their favor for the last Twelve (12) Years only to realize that statutory period to enforce their judgment has passed and as such they have rushed to this Honourable court for assistance to fix their laches it was submitted that Equity aids the vigilant not the indolent.

47. It was submitted in contention that this application is premature and the orders being sought should not be granted as prayed by the Applicant but that the Application be dismissed with cost to the Respondent.

DETERMINATION

48. I have considered the exparte applicant's Notice of Motion, supporting documents, affidavits and submissions together with statutory and case law cited as well as the Respondent's opposition and submissions supported by statutory and case law. In my humble view, the main issue for determination in this application for judicial review orders of mandamus to compel settlement of decretal sum in **Siaya PMCC NO. 16 OF 2004** is whether the exparte applicant has made out a case for grant of the orders sought in the Notice of motion.

49. It is not in dispute that the Ugunja Town Council as initially sued is no longer in existence. The said Town Council ceased to exist with the repeal of the Local Government Act, Cap. 265 Laws of Kenya. The Local Government Act was repealed by section 134 (1) of the County Governments Act, No.17 of 2012. I am therefore in agreement with the assertion by the advocates for the exparte applicant that after the repeal of the Local Government Act, local authorities and offices such as that of the Ugunja Town Council ceased to exist as legal entities and as such cannot sue and be sued and can neither proceed with nor be proceeded against with respect to any pending suit nor decree executed against it.

50. The respondent has not contended that legal suits that were pending against the defunct local authorities prior to the repeal of the Local Government Act cannot be proceeded with against the County Governments. Its contention is that this application is premature because the Intergovernmental Technical Committee has not completed the task of auditing the assets and liabilities of the former entities for purposes of

handing over the same to the County Governments. The Respondents further contend that the exparte applicant has not complied with Section 21 of the Government Proceedings Act and that neither has it demanded for payment although it further contents that such demand would not be complied with for the aforesaid legal reasons.

51. A similar objection to settlement of decree of the court by the successor County Government from former Municipal Council was raised in the case of **Dr. J. A. S. Kumenda & Another vs. The Clerk, Municipal Council of Kisii & 6 others, Kisii HC. Misc. Civil Application No. 3 of 2013**, where Okong'o J of the Environment and Land Court overruled the objection and in my humble view, the learned Judge rightly did so. Though persuasive, the decision by the learned Judge of the Environment and Land Court was sound.

52. It therefore follows that the Respondent County Government of Siaya cannot contend that there is no nexus between it and the defendants in the suit subject of this application that would justify its being enjoined to this application for purposes of execution of decree. And there being a clear nexus between the Ugunja Town Council and the County Government of Siaya, there would even be no need to have joined the Respondent herein to the suit prior to the filing of these judicial review proceedings.

53. Nonetheless, the question is whether the applicant is entitled to the prayers sought. The Court of Appeal in **Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996**, citing with approval, *Halsbury's Law of England*, 4th Edn. Vol. 7 p. 111 para 89 stated:

"The order of mandamus is of most extensive remedial nature and is in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases where although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."...These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

54. In this case, the exparte Applicant herein has moved this Court to compel the satisfaction of a judgement already decreed in its favour by a competent Court of law. The Respondents have given reasons why the decree has not been satisfied more than ten years ago, being that they were never aware of the claim or decree as they were never served with a demand for settlement and this court has not been shown any such demand or service of decree or judgment upon the Respondents by the exparte applicant.

55. There is however no dispute that the applicant has a judgment and decree of the court, against Ugunja Town Council which is the predecessor of the Siaya County Government. That decree is executable as stipulated in the Government Proceedings Act which bars attachment and sale of Government property in execution of decree hence the application for mandamus to put in motion the process of execution of the said decree.

56. A decree is executable within 12 years from the date of judgment. In the instant case, twelve years have not elapsed hence the application is within time.

57. However, this court does not comprehend why the exparte applicant took all those years from 2008 without executing a money decree. Albeit it alleges that there were promises by the respondents to pay which they never honoured, there is no single letter addressed to the Respondents herein seeking for payment or settlement of the decree. Oral demands and promises which this court doubts were allegedly made by the Respondents do not amount to demands for payment or settlement of decree by a Government body or department.

58. The procedure required to be followed for payment of damages or costs due from the Government to be effected by the Accounting Officer, is elaborately set out in section 21 (1) and (2) of the Government Proceedings Act, Cap 40 Laws of Kenya. The decree holder is in this regard only required to serve the Certificate of Costs on the Attorney General, as the legal representative of the accounting officer, who then advises and arranges for the accounting officer to make the payment. This position was reiterated in **Republic v Permanent Secretary, Ministry of State for Provincial Administration and Internal Security ex parte Fredrick Manoah Egunza [2012]eKLR**

59. **However, the exparte applicant in this case** did not bring evidence of service of the Certificate of Costs against the Government on the County Attorney, in this case, the matter being against the County Government of Siaya. Section 21 of the Government Proceedings Act provides as follows as regards the requirements to be met in the enforcement of orders as against Government in civil proceedings:

"(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 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.

(2) A copy of any certificate issued under this section may be served by the person in whose favour the order is made upon the Attorney-General.

(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, 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.

(4) Save as aforesaid, 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 aforesaid, 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.”

60. It is evident from section 21(3) above that the person who is responsible for the payment of any damages or costs awarded against the Government is the accounting officer of the Ministry or public body concerned, who is the one under a statutory duty to satisfy a judgment made by the Court against that Ministry or body. This position was explained in **Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security (2012) e KLR** by Githua J. as follows:

“In ordinary circumstances, once a judgment has been entered in a civil suit in favour of one party against another and a decree is subsequently issued, the successful litigant is entitled to execute for the decretal amount even on the following day. When the Government is sued in a civil action through its legal representative by a citizen, it becomes a party just like any other party defending a civil suit. Similarly, when a judgment has been entered against the government and a monetary decree is issued against it, it does not enjoy any special privileges with regards to its liability to pay except when it comes to the mode of execution of the decree. Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the Government Proceedings Act. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the Government Proceedings Act (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, Section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon.” [emphasis added]

61. Therefore, since the 1st Respondent is the accounting officer of the County Government of Siaya, this court expects that it should have been served with a Certificate of Order against the Government, Decree or any demand letter asking for payment. In the absence of such evidence, the claim that there has been willful refusal by the Respondents to pay is not true.

62. In **Republic v County Government of Nakuru & another; James Mwangi Muraya (Ex parte) [2020] eKLR** Mbaru J of the Employment and Labour Relations Court held as follows and I concur:

“The respondent being a County Government and its officer(s) by dint of section 21(5) is bound as a government with modifications as appropriate in Permanent Secretary Office of the President Ministry of Internal Security & Another ex parte Nassir Mwachhihi (2014) eKLR also had the following to say of the matter:

... 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 and R vs. The Bristol and Exeter Railway Co 114 ER 859.

The procedures outlined under section 21 of the Government Proceedings Act are elaborate and hence meant to give adequate notice to the County Government such as the respondents to make arrangement to satisfy the decree. The procedure, in my view is not meant to relieve the county from meeting its statutory obligations to satisfy decrees and orders of the Court. see Republic versus County Secretary Migori County Government & another [2019] eKLR.”

The ex parte applicant has a Decree and a Certificate of Costs. There is no Certificate of Order. There is a specific procedure on how the Certificate of Order required is obtained. The procedure is contained in Order 29 of the Civil Procedure Rules.

Upon obtaining the appropriate Certificates of costs and Certificate of Order there must be proof of service upon the respondent(s) thereof.

The court finds the ex parte applicant has not fully complied with the legal requirements for an order of mandamus to be issued

in this instance. The application is premature.

the Notice of Motion dated 19th April, 2019 is hereby struck out. Each party shall bear own costs.[emphasis added]

63. Applying the above principles of law both statutory and case law to this case, I find and hold that the Judicial Review application herein does not meet the threshold for grant of Judicial Review remedy of *mandamus*, as the provisions of section 21 of the government Proceedings Act, Cap 40 Laws of Kenya have not been complied with. I find the application premature. I would have dismissed the Motion but as the decree is still alive, and to accord the *exparte* applicant an opportunity to exhaust the remedy, I proceed and strike out the Notice of Motion dated 22nd May 2020 with an order that each party bear their own costs.

Orders accordingly.

Dated, Signed and Delivered at Siaya this 1st Day of July, 2020.

R.E.ABURILI

JUDGE

Via Microsoft Teams Virtual Court in the presence of Mr. Sumba Advocate for the *exparte* applicant and Mr. Were Advocate for the Respondents

Court Assistant: Brenda Ochieng'