REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. 221 OF 2016

IN THE MATTER OF THE CIVIL PROCEDURE ACT CAP 21

LAWS OF KENYA

BETWEEN

REPUBLIC…….…….....….APPLICANT

VERSUS

COUNTY CHIEF OFFICER,

FINANCE & ECONOMIC PLANNING,

NAIROBI CITY COUNTY…...……..…….....…….RESPONDENT

EX PARTE: STANLEY MUTURI

RULING

Introduction

1. By a Notice of Motion dated 28th October, 2016, applicant herein, **Stanley Muturi,** seeks the following orders:

> **1. That respondent be cited for contempt of court and committed to civil jail for a term of six (6) months and/or be ordered to purge the contempt of court on terms this court will deem just.**
>
> **2. Summons be issued against the respondents to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just.**
>
> **3. The Respondent do pay the costs of this application.**

2. According to the applicant, on 13th September, 2016, the respondent was ordered to honour the decree in the Subordinate Court which Court had itself decreed that the respondent pays the applicant a sum of Kshs 516,362.52 with effect from 15th March, 2016 together with interest thereon at 12% p.a.

3. It was averred by the applicant that the interest that accrued on the sum for the period of nine months since decree was issued is Kshs 46,473.00 hence the sum that the respondent is supposed to pay to me to

is Kshs 562,835.52.

4. According to the applicant, despite the decree/order in this case having been extracted and served upon the respondent, and a return of service of the decree/order as well as penal notice has been filed in Court, the respondent has blatantly disobeyed a court order and shown contempt for the dignity of the court hence the orders sought herein.

Respondent's Case

5. In opposition to the application the Respondent filed the following grounds of opposition:

1. That at the outset, the said application is premature, misconceived and bad in law and the respondent will raise a point of law to be determined *in limine* and that the applicant has misled the court to issue order of mandamus against the respondent. In any case, the County Government responsibilities with respect to management and control of public finance under the Public Finance Management Act, CAP 412C of the Laws of Kenya provides that the Statutory duty to pay out funds from the County Treasury vests in the County Executive Committee member in charge of Finance.

2. That the application is fatally incompetent and incurably defective.

3. That the court order dated 23rd September, 2016 which the applicant purports to be blatantly disobeyed by the respondent was neither served upon the respondent nor its advocate as alleged by the applicant.

4. That the order sought by the applicant do not lie as against the respondent as there is no statutory duty imposed upon the respondent to act as demanded. That such order should therefore be referred to the County Executive Committee member in charge of finance and not the respondent herein who is wrongly suited.

5. That the applicant has not stated under which law the cited respondent has a duty to act as demanded.

6. That the applicant cannot claim that the respondent is in contempt of court hereof and that the respondent has no authority to act as ordered.

7. That the respondent avers that the County Government's responsibilities with respect to management and control of public finance under the Public Finance Management Act, CAP 412C of the Laws of Kenya gives the duty to pay out funds from the County Treasury upon the County Executive Committee member in charge of Finance and not the respondent herein thus the respondent herein is wrongly suited.

8. That the claim by the applicant against the respondent for contempt of court is null and void. The applicant cannot found a cause of action by instituting a wrong party.

9. That the Applicant's application is frivolous, vexatious and totally devoid of merit and *mala fides* for the reason *inter alia*, that the applicant's application dated 28th October, 2016 was a waste of this honourable courts time and that the applicant should have in the first place directed its claim of contempt to the County Executive Committee member in charge of Finance and not the respondent herein.

10. That further, the alleged contemnor, is a public officer and is prohibited in law; under Section 196 and 197 of the Pubic Finance Management Act, (2012) from paying the applicant as ordered for it would be an offence to spend any public funds without any prior authorization.

11. That the respondent does not owe any duties or obligations to the applicant. In any case, the respondent should have been the one to move to court and claim damages from the applicant for wrongful institution and waste of this honourable court's time.

12. That the balance of convenience tilts in favour of the respondent for the respondent has clearly established that the applicant had wrongfully instituted it, knowing that the respondent has no authority to act as demanded by the order hence the applicant has no right to the prayers sought in the application dated 28/10/2016.

13. That the applicant has no prima facie case with a probability of success to warrant any prayer sought as no infringement of the law has been established.

14. That the county government has various competing interests catered for in the budget. This honourable court to allow for the applicant's claim to be factored in the forthcoming budget as approved by the county assembly since the county executive cannot expend money not approved in the budget. It will amount to illegality.

15. That this application is frivolous, vexatious and lacks merit and ought to be dismissed.

16. That the application is an abuse of precious judicial time and it is in the interests of justice and fairness that the instant application be dismissed with costs to the respondent.

6. The Respondent also filed replying affidavit in which the aforesaid grounds were regurgitated.

7. Before dealing with the issues raised in this applicant, it is important to revisit the current position with respect to contempt of Court. Parliament vide Act No. 46of 2016 enacted the ***Contempt of Court Act***, 2016 which was assented to on 23rd December, 2016 and commenced on 13th January, 2017.

According to the said Act contempt includes civil contempt means wilful disobedience of any judgment, decree, direction, order, or other process of a court or wilful breach of an undertaking given to a court. It is therefore clear that the wilful disobedience of a judgement, decree or order properly constitutes contempt of Court. Section 30 of the said Act provides that:

(1) Where a State organ, government department, ministry or corporation is guilty of contempt of court in respect of any undertaking given to a court by the State organ, government department, ministry or corporation, the court shall serve a notice of not less than thirty days on the accounting officer, requiring the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(2) No contempt of court proceedings shall be commenced against the accounting officer of a State organ, government department, ministry or corporation, unless the court has issued a notice of not less than thirty days to the accounting officer to show cause why contempt of court proceedings should not be commenced against the accounting officer.

(3) A notice issued under subsection (1) shall be served on the accounting officer and the Attorney-General.

(4) If the accounting officer does not respond to the notice to show cause issued under subsection (1) within thirty days of the receipt of the notice, the court shall proceed and commence contempt of court proceedings against the accounting officer.

(5) Where the contempt of court is committed by a State organ, government department, ministry or corporation, and it is proved to the satisfaction of the court that the contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of any accounting officer, such accounting officer shall be deemed to be guilty of the contempt and may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.

(6) No State officer or public officer shall be convicted of contempt of court for the execution of his duties in good faith.

8. It is therefore clear that before any civil contempt of court proceedings are instituted in disobedience of a judgement, decree or order, the applicant must first move the Court to issue a notice to show cause against the accounting officer of the State organ, government department, ministry or corporation concerned. Such notice is to be served on both the accounting officer and the Attorney General. If no response to the notice is received, the Court may then at the expiry of the said thirty days' notice proceed to commence contempt of court proceedings against the concerned accounting officer. In my view the thirty days' period is meant to enable the Attorney General to give legal advice to the entity concerned and thus avoid the necessity of contempt proceedings. Where however the entity believes that contempt of court proceedings ought not to be commenced, the entity is required to within the said period show cause, in my view preferably by way of an affidavit why the said proceedings ought not to be commenced. The Court will then determine whether cause has been shown or not based on the material before it. Without the rules of procedure having been promulgated it is therefore my view that an application for notice ought to be accompanied by an affidavit and that application may be heard ex parte since the merits thereon may be dealt with when the cause is shown by the entity or public officer concerned.

9. Where no cause is shown and the contempt of court proceedings are commenced, the Court can however only find that officer guilty of contempt upon satisfactory proof that the said contempt has been committed with the consent or connivance of, or is attributable to any neglect on the part of the accounting officer. Such officer will then be liable to a fine not exceeding two hundred thousand shillings.

10. With respect to the contempt pf court proceedings subsequent to the issuance of the notice to show cause, section 7(3) of the said Act provides that:

"…any proceedings to try an offence of contempt of court provided for under any other written law shall not take away the right of any person to a fair trial and fair administrative action in accordance with Articles 47 and 50 of the Constitution."

11. It follows that the rules of natural justice ought to be adhered to in respect of the proceedings subsequent to the notice to show cause. In this respect it is expected that the application seeking orders to commit for contempt ought to be served personally upon the person sought to be committed. Section 37 of the Act empowers the Chief Justice to The Chief Justice may make rules for the better carrying out of the purposes of the Act. Before the enactment of the Act, section 5 of the ***Judicature Act*** imported the procedure for contempt of court followed by the High Court of Justice in England. Whereas the said section was deleted by section 38 of the Act, the rules contemplated by section 37 have not yet been promulgated. In my view, in the absence of the rules of procedure the lacuna must be filled by the invocation of section 24 of the ***Interpretation and General Provisions Act*** which provides that:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

12. The procedure existing before the enactment of the Contempt of Court Act was restated by the Court of Appeal in **Christine Wangari Gachege vs. Elizabeth Wanjiru Evans & 11 Others [2014] eKLR**. In that case the Court found that under Rule 81.4 of the ***Civil Procedure (Amendment No. 2) Rules***, 2012, which deals with breach of judgement, order or undertaking, the application for contempt is made in the proceedings in which the judgement or order was made or undertaking given by what is referred to as "application notice" which application is required to set out fully the grounds on which the committal application is made, identify separately and numerically, each alleged act of contempt and be supported by affidavit(s) containing all the evidence relied upon. The said application and affidavit(s) must be

served personally on the respondent unless the Court dispenses with the same if it considers it just to do so or authorises an alternative mode of service. In that case, the Court of Appeal held that leave or permission is nolonger required in such proceedings. In our case however, section 30(5) c0mplicates the procedure by stating that the contemnor, in case of a State organ, government department, ministry or corporation ***may with the leave of the court be liable to a fine not exceeding two hundred thousand shillings.***

13. In my view, to require an applicant to apply for leave to impose a sentence after the Court has been satisfied that a contempt of court has been committed by a State organ, government department, ministry or corporation would negate the provisions of Article 159(2)(d) of the Constitution. It is therefore my view that an applicant for contempt may perfectly apply for leave to fine the contemnor in the same application seeking that the Court finds the Respondent to be in contempt. To that extent the leave would only be with respect to mitigating factors and the sentence to be meted.

14. It is therefore my view that the procedure described by the Court of Appeal ought to be adopted with necessary modifications. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008,** Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law hence there cannot be a gap in the application of the rule of law. Therefore where there is a lacuna with respect to enforcement of remedies provided under the Constitution or an Act of Parliament, or if, through the procedure provided under an Act of Parliament, an aggrieved party is left with no alternative but to invoke the jurisdiction of the Court and the Court is perfectly within its rights to adopt such a procedure as would effectually give meaningful relief to the party aggrieved. To fail to do so would be to engender and abet an injustice and as has been held before, a court of justice has no jurisdiction to do injustice. See **M Mwenesi vs. Shirley Luckhurst&Another Civil Application No. Nai. 170 of 2000** and **Kenya Industrial Estates Ltd vs. Transland Shoe Manufacturers Ltd. & 2 Others Civil Application No. Nai. 364 of 1999.**

15. It has been recognised that the law may be thought to have failed if it can offer no remedy for the deliberate acts of one person which injures another. See **Bollinger vs. Costa Brava Wine Co. Ltd [1960] 1 Ch. 262 at 238**. As was held in **Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; VOL. 1 KAR 1192; [1986-1989] EA 57** citing **Midland Bank Trust Co. vs. Green [1982] 2 WLR 130:**

> **"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."**

16. It is therefore clear that the law must adapt to the changing social conditions and where unlawful interference with a citizen's rights gives rise to a right to claim redress and if the ex parte applicant has a right he must of necessity have the means to vindicate it and a remedy if they are injured in the enjoyment or exercise of it since it is a vain thing to imagine a right without a remedy; for want of right and want of remedy are reciprocal. See **Rookes vs. Barnard [1964] AC 1129** and **Ashby vs. White [1703] 2 Ld Raym.938; 92 ER 126.**

17. In **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya** (supra) it was held that just as nature abhors a vacuum, even the enforcement of the rule of law abhors a vacuum or a gap in its enforcement. Accordingly the Courts should uphold the jurisprudence that helps to "illuminate the dark spots and shadows in all circumstances, so that justice as a beacon of light and democratic ideals is practiced and hailed at all times over the hills, valleys, towns and homes in this beautiful land of Kenya. The mantle of justice and the rule of law must cover all corners of Kenya in all stations. Courts have a continuing obligation to be the foremost protectors of the rule of law".

18. In this case, the Respondents seems to be questioning the legality of the grant of the orders of mandamus herein. That stage with due respect was passed when the application for the relief of an order of mandamus was being argued.

19. With respect to the issue that it is the accounting officer that is legally bound to satisfy a decree, **Goudie, J**, in **Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543** expressed himself, *inter alia*, as follows:

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

not have been obtained in proceedings against the Government contrary to section 15(2) of the Government Proceedings Act. What the applicant is seeking is not relief against the Government but to compel a Government official to do what the Government, through Parliament, has directed him to do. Likewise there is nothing in section 20(4) of the Act to prevent the making of such order. The subsection commences with the proviso "save as is provided in this section". The relief sought arises out of subsection (3), and is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Treasury Officer of Accounts is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Crown servant in his official capacity and the duty is owed not to the Crown but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. Where a duty has been directly imposed by Statute for the benefit of the subject upon a Crown servant as *persona designata,* and the duty is to be wholly discharged by him in his official capacity, as distinct from his capacity as an adviser to or an instrument of the Crown, the Courts have shown readiness to grant applications for *mandamus* by persons who have a direct and substantial interest in securing the performance of the duty. It would be going too far to say that whenever a statutory duty is directly cast upon a Crown servant that duty is potentially enforceable by *mandamus* on the application of a member of the public for the context may indicate that the servant is to act purely as an adviser to or agent of the Crown, but the situations in which *mandamus* will not lie for this reason alone are comparatively few…*Mandamus* does not lie against a public officer as a matter of course. The courts are reluctant to direct a writ of *mandamus* against executive officers of a government unless some specific act or thing which the law requires to be done has been omitted. Courts should proceed with extreme caution for the granting of the writ which would result in the interference by the judicial department with the management of the executive department of the government. The Courts will not intervene to compel an action by an executive officer unless his duty to act is clearly established and plainly defined and the obligation to act is peremptory…On any reasonable interpretation of the duty of the Treasury Officer of Accounts under section 20(3) of the Act it cannot be argued that his duty is merely advisory, he is detailed as *persona designate* to act for the benefit of the subject rather than a mere agent of Government, his duty is clearly established and plainly defined, and the obligation to act is peremptory. It may be that they are answerable to the Crown but they are answerable to the subject…The court should take into account a wide variety of circumstances, including the exigency which calls for the exercise of its discretion, the consequences of granting it, and the nature and extent of the wrong or injury which could follow a refusal and it may be granted or refused depending on whether or not it promotes substantial justice… The issue of discretion depends largely on whether or not one should, or indeed can, look behind the judgement giving rise to the applicant's decree. Therefore an order of *mandamus* will issue as prayed with costs."

20. It is true that the County Executive in Charge of Finance is the one under obligation to pay funds, in the capacity as the accounting officer. It must always be remembered that a judicial review application is neither a criminal case nor a civil suit hence the application ought to be brought against the person who is bound to comply with the orders sought therein. In this case the Respondent ought to have been the Accounting Officer.

21. However, as this is merely a misjoinder the same ought not to be fatal to the application though the Court may in exercise of its discretion deny the applicant, even if successful, costs of the application. An issue as to the effect of misjoinder in judicial proceedings was the subject of determination in **Republic Ex Parte the Minister for Finance & The Commissioner of Insurance as Licensing and Regulating**

Officers vs. Charles Lutta Kasamani T/A Kasamani & Co. Advocate & Another Civil Appeal (Application) No. Nai. 281 of 2005 in which the Court of Appeal stated:

> **"Suffice it to say that a defect in form in the title or heading of an appeal, or *a misjoinder or non-joinder of parties are irregularities that do not go to the substance of the appeal and are curable by amendment*...Is the form of title to the appeal as adopted by the Attorney General in this matter defective or irregular? We think not, as we find that it substantially complies with the guidelines set out by this Court".** [Emphasis added].

22. This was the position adopted in **Consolata Kihara & 21 Others vs. The Director of Kenya Trypanosomiasis Research Institute Nairobi H.C. Misc. Appl. No. 594 of 2002 [2003] KLR 582**, where it was held that issues of joinder and misjoinder of parties are not of significance where no miscarriage of justice or any form of injustice is alleged as a result of the choosing of parties to the litigation. This position is even more relevant to proceedings in the nature of judicial review which are neither criminal nor civil and particularly in application for mandamus where what is sought is the enforcement of a decree against the respondent not in his personal capacity but in his official capacity. In such circumstances, the respondent is simply being compelled to facilitate the payment as opposed to imposing personal liability.

23. It is therefore my view that whereas misjoinder or non-joinder may lead to denial of costs in the event that the party in default succeeds in the application or even being penalised in costs, that blunder is not incurably defective and ought not on its own be the basis upon which an otherwise competent application is to be dismissed where the substance of the reliefs sought can still be realised notwithstanding the irregularity.

24. Article 159(2)(d) of the Constitution enjoins this Court to administer justice without undue regard to technicalities of procedure, as long as the rules of natural justice are adhered to. At the end of the day the entity which is bound to settle the decree is the County Government and not the said officer in his personal capacity. Misjoinder of parties in County Governments was also considered in **Council of Governors & Others vs. The Senate Petition No. 413 of 2014** where it was held that:

> **"…the role of the Governor under Section 30(3) (f) of the County Governments Act is critical in fiscal management at the County level. He is the Chief Executive Officer and the buck stops with him in the management of county resources. It is critical that such a provision exists so as to ensure responsibility of public resources which would ultimately enhance the national values as provided for under Article 10 of the Constitution as well as the spirit and tenor of constitution."**

25. In High Court Judicial Review Miscellaneous Application No. 44 of 2012 between the **Republic vs. The Attorney General & Another ex parte James Alfred Koroso**, I expressed myself as hereunder:

> **"…the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from *mandamus*, he has no option of ensuring that the judgement that he has been awarded is realised. Unless something is done he will forever be left baby sitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers. Public offices, it must be remembered are held in trust for the people of Kenya and Public Officers must carry out their duties for the benefit of the people of the Republic of Kenya. To deny a citizen his/her lawful rights which have been decreed by a Court of competent jurisdiction is, in my view, unacceptable in a democratic society. Public officers must remember that under Article 129 of the Constitution executive authority derives from the people of Kenya and is to be exercised in accordance with the Constitution in a**

manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit…..The institution of judicial review proceedings in the nature of *mandamus* cannot be equated with execution proceedings. In seeking an order for *mandamus* the applicant is seeking, not relief against the Government, but to compel a Government official to do what the Government, through Parliament, has directed him to do. The relief sought is not "execution or attachment or process in the nature thereof". It is not sought to make any person "individually liable for any order for any payment" but merely to oblige a Government officer to pay, out of the funds provided by Parliament, a debt held to be due by the High Court, in accordance with a duty cast upon him by Parliament. The fact that the Accounting Officer is not distinct from the State of which he is a servant does not necessarily mean that he cannot owe a duty to a subject as well as to the Government which he serves. Whereas it is true that he represents the Government, it does not follow that his duty is therefore confined to his Government employer. In *mandamus* cases it is recognised that when statutory duty is cast upon a Public Officer in his official capacity and the duty is owed not to the State but to the public any person having a sufficient legal interest in the performance of the duty may apply to the Courts for an order of *mandamus* to enforce it. In other words, *mandamus* is a remedy through which a public officer is compelled to do a duty imposed upon him by the law. It is in fact the State, the Republic, on whose behalf he undertakes his duties, that is compelling him, a servant, to do what he is under a duty, obliged to perform. Where therefore a public officer declines to perform the duty after the issuance of an order of *mandamus*, his/her action amounts to insubordination and contempt of Court hence an action may perfectly be commenced to have him cited for such. Such contempt proceedings are nolonger execution proceedings but are meant to show the Court's displeasure at the failure by a servant of the state to comply with the directive of the Court given at the instance of the Republic, the employer of the concerned public officer and to uphold the dignity and authority of the court."

26. It is therefore my view that the misjoinder of parties in the circumstances of this case ought not to be fatal to this otherwise proper application.

27. As regards the existence of the competing interests, **Githua, J** in **Republic vs. Permanent Secretary, Ministry of State for Provincial Administration and Internal Security Exparte Fredrick Manoah Egunza [2012] eKLR** expressed herself 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. *This provision*

***does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues*.”** [Emphasis mine].

28. I associate with the said decision and it is therefore my view that settlement of decretal sum by the Government whether National or County does not necessarily depend on the availability of funds. This position was appreciated by this Court in **Wachira Nderitu, Ngugi & Co. Advocates vs. The Town Clerk, City Council of Nairobi Miscellaneous Application No. 354 of 2012** in which this Court pronounced itself as follows:

> **“I have however considered the other issues raised by the respondent with respect to its debt portfolio as against its financial resources. It is neither in the interest of this Court nor that of the ex parte applicant that the respondent should be brought to its knees. The Court appreciates and it is a matter of judicial notice that most of the local authorities are reeling under the weight of the debts accrued by their predecessors and that they are trying to find their footing in the current governmental set up. Accordingly I am satisfied based on the material on record that the respondent ought to be given some breathing space to arrange its finances and settle the sum due herein.”**

29. In my view a party facing financial constraints is at liberty to move the Court for appropriate orders which would enable it to settle its obligations while staying afloat. That however, is not a reason for one to evade its responsibility to settle such obligations. In other words financial difficulty is only a consideration when it comes to determining the mode of settlement of a decree but is not a basis for declining to compel the Respondent to settle a sum decreed by the Court to be due from it. That objection therefore fails.

30. The Respondent however argued that there was no penal notice served before the present application was instituted. In my view in matters where what is sought to an order implementing an order of mandamus, the proceedings are special proceedings that ought to be conducted in strict adherence to the relevant law. In this case, the ***Contempt of Court Act*** does not require that a penal notice be served. What is required instead is the notice to show cause. In this case prayer 2 seeks an order that summons be issued against the respondents to appear before this court and show cause why they should not be committed to civil jail for such term as the court may deem just. In my view that is the only order that this Court may grant at this stage taking into account the state of the law as it stands currently.

31. In the premises I hereby direct that the Respondent do appear before this Court in the company of the County Executive in Charge of Finance to show cause why contempt of court proceedings cannot be commenced against them.

32. The costs of this application are awarded to the ex parte applicant.

Dated at Nairobi this 21st day of February, 2017

G V ODUNGA

JUDGE

Delivered in the absence of the parties.

CA Mwangi